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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

FREDERICK M. DEVER, JR.,

Petitioner,

versus

THE STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the admission of a child's out-of-court statement made to a physician pursuant to Rule 803(4), Ohio Rules of Evidence, where the prosecution fails to establish any burden imposed upon it, including the burden of establishing that the statement was uttered by the child for purposes of medical treatment, for admission of the statement, or that the statement possessed some indicia of reliability and a particularized guarantee of trustworthiness, violate petitioner's Confrontation Clause right vested to him by the Fourth and Fourteenth Amendments of the Constitution of the United States?

2. Does the shift of the burden imposed by the Confrontation Clause of the Sixth Amendment of the Constitution of the United States, during appellate review before the Supreme Court of Ohio, for the admission of an out-of-court declaration from the prosecution to the petitioner to establish that the statement was unreliable and untrustworthy, violate petitioner's Confrontation Clause right vested to him by the Sixth Amendment and a denial of due process of law granted by the Fourteenth Amendment of the Constitution of the United States?

3. Does the establishing of a new standard for conviction which was never present at the time of petitioner's trial constitute a denial of due process of law in the retroactive application of a new standard utilized for the first time by the Supreme Court of Ohio in review of petitioner's case, including a construction of Ohio's evidence rules in a manner different from the construction of

QUESTIONS PRESENTED FOR REVIEW – Continued

those rules at the time of petitioner's trial, violate both the Confrontation Clause of the Sixth Amendment and Due Process of Law Clause of the Fourteenth Amendment of the Constitution of the United States.

PARTIES TO THE PROCEEDING BEFORE THE SUPREME COURT OF OHIO

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OPINIONS BELOW

The order of the Supreme Court of Ohio denying petitioner's motion for rehearing and the opinion of the Supreme Court of Ohio reversing the Court of Appeals and reinstating petitioner's conviction are reported at 65 Ohio St.3d. 1422, 598 N.E.2d 1172 (1992), and at 64 Ohio St.3d 401, 596 N.E.2d 436 (1992), and set forth as Appendices A and B, respectively. The second opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, which reversed petitioner's conviction following this Court's grant of certiorari, vacating the judgment of the Court of Appeals, and remanding the case for reconsideration in light of *Idaho* v. *Wright*, 497 U.S. 805

(1990), is unreported and set forth as Appendix C. The opinion of this Court granting certiorari, vacating the judgment of the Court of Appeals, and remanding the case for further consideration is reported at 498 U.S. ___, 111 S.Ct. 575 (1990), and is set forth as Appendix D. The orders of the Supreme Court of Ohio overruling petitioner's motion for leave to appeal and his claimed appeal as of right and the denial of petitioner's motion for rehearing are reported at 52 Ohio St.3d 701, 556 N.E.2d 526 (1990) and 53 Ohio St.3d 706, 558 N.E.2d 62 (1990) and set forth as Appendices E and F, respectively. The first opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, affirming petitioner's conviction is unreported and set forth as Appendix G. The journal entry of the Court of Common Pleas, Hamilton County, Ohio, finding the child not competent to testify is unreported and set forth as Appendix H.

JURISDICTION

The Supreme Court of Ohio affirmed the judgment and sentence of the Court of Common Pleas, Hamilton County, Ohio, on August 19, 1992. Petitioner's timely motion for rehearing was denied by the Supreme Court of Ohio on September 30, 1992.

The jurisdiction of this Court is founded upon the presence of federal questions governed by the Constitution of the United States as a continuity of state appellate review to provide procedural and substantive due process safeguards within the state of Ohio's criminal justice system. The issues raised for review are the denial of

petitioner's right of confrontation vested to him by the Sixth and Fourteenth Amendments of the Constitution of the United States; the change of the burden of persuasion, during appellate review before the Supreme Court of Ohio, from the state of Ohio to petitioner to establish that the child's out-of-court declaration was unreliable and untrustworthy thereby removing the burden imposed by the Confrontation Clause upon the movant for the admission of the out-of-court statement, such burden shift constituting a denial of due process of law vested to petitioner by the Fourteenth Amendment of the Constitution of the United States; and the establishing of a new standard for conviction by the Supreme Court of Ohio repugnant to the Confrontation Clause and in which such new standard was utilized for the first time by the Supreme Court of Ohio during its review of the case and thereby altered the standard of law which was present during petitioner's trial as a denial of due process of law vested to petitioner by the Fourteenth Amendment of the Constitution of the United States.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) and Part III of the Rules of this Court.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The Sixth and pertinent provisions of the Fourteenth Amendments of the Constitution of the United States are set forth in Appendix I. The pertinent provisions of Section 2907.02, Revised Code of Ohio, and Section 2907.05,

Revised Code of Ohio, are set forth in Appendix J. Rules 102, 601(A), 803(4), 804(A)(3), and 807, Rules of Evidence, Title 23, Revised Code of Ohio, are set forth in Appendix K.

STATEMENT OF THE CASE

Petitioner was convicted by jury of the crime of rape in violation of § 2907.02, Revised Code of Ohio, and of the offense of gross sexual imposition in violation of § 2907.05, Revised Code of Ohio. On October 12, 1988, petitioner was sentenced for the rape offense by the Court of Common Pleas, Hamilton County, Ohio, to a term of incarceration in the Ohio penal system of not less than 10 nor more than 25 years, with a provision for actual incarceration of five years. The trial court imposed no sentence for the offense of gross sexual imposition finding that it merged with the crime of rape.

Petitioner's convictions rested upon the testimony of Ann Saluke, M.D., a pediatrician who examined petitioner's daughter in the late afternoon of October 23, 1987, two days after the alleged sexual abuse: October 21, 1987.

At the time of Dr. Saluke's examination petitioner's daughter was four and one-half years old. The duration of the entire examination of the child was 30 minutes. Dr. Saluke stated that there was no finding of abuse and the examination and tests administered neither confirmed nor disproved sexual abuse. The physician described the protocol and "customary" practice of examining potentially abused children, but no testimony was presented

concerning how the protocol and the "customary" practice generally employed in child abuse cases by Dr. Saluke was applied to petitioner's child. Dr. Saluke testified that she did not recall the child's specific responses of whether the child understood why she was being asked questions by the physician. At the commencement of the questioning, petitioner's daughter, according to Dr. Saluke, "seemed to kind of jump from topic to topic and didn't really seem to be answering our questions and she kept looking at her mother and looking around the room and changing the subject." The child's mother left the room either at her volition or at the request of the social worker and physician. The record possesses no information of what occurred following the mother's departure, reflecting only that the physician "asked questions" and took notes; the record reports only what Dr. Saluke states the child said, not the manner in which it was stated or what lead to the statement. Dr. Saluke was permitted to testify, over petitioner's objection on hearsay and Confrontation Clause violation grounds, as to the following:

> Q. Okay, what did Kristen tell you?
>
> [Objection lodged, argument pursued, trial court overruled objection].
>
> Q. Doctor, what did Kristen tell you happened?
>
> A. Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as pee pee.

Q. Did she identify what she meant by father's pee pee?

A. The same area.

Q. Okay, now did she describe that taste any further beside yucky taste?

A. She described it as mashed potatoes with butter.

MR. BUTLER: Thank you, no further questions.

Petitioner objected to Dr. Saluke's testimony of the child-declarant's statement on the basis that there was no adequate showing by the prosecution that the child understood the reason for the examination and the request for identification of the purported offender; that there was no evidence of any adequate understanding between patient and physician and that the child did not understand what was being asked or that identification would be necessary for diagnosis or treatment bearing upon motive for the response; that there was nothing to establish reliability and trustworthiness of any statement; from which petitioner was denied his right of confrontation granted to him by the Sixth Amendment of the Constitution of the United States.

The trial court overruled the objection, finding that a sufficient foundation was present within medical history reasonably pertinent to treatment and that *United States* v. *Renville*, 779 F.2d 430 (8th Cir., 1985) was controlling. However, the Court of Appeals in reversing the trial court stated that "[a]lthough the *Renville* decision emphasized the admissibility of statements relating to identity, the decision did not dispense with the requirement that

the declarant must be motivated by a desire to obtain treatment or diagnosis. [*United States* v. *Renville*, 779 F.2d,] at 438-39." (Appendix C, App. 46-47).

At trial the prosecution presented two witnesses in addition to Dr. Saluke: Diane Potter who lived in the apartment above petitioner and Specialist Mike Wilson, Mariemont, Ohio, Police Department, who received a report from Ms. Porter and who conducted an investigation.

Ms. Potter's testimony was substantially similar to a written statement identified in the record as State's Exhibit 1, prepared by her for Specialist Wilson at the Mariemont Police Department sometime after 10 p.m., October 21, 1987. She testified that on October 21st, around 10:00 o'clock p.m. she was in her bathroom and heard the child "whining" and her father "arguing." She heard the child's father saying, "come on, it will take only a minute," and the child responding, "no, daddy, I'm sleeping." The witness then "heard a toilet seat" and knew that they were in the bathroom. She heard petitioner groaning and commenced listening closely. Ms. Potter heard petitioner tell his daughter to count to 600 and heard her counting. She then heard petitioner remark that it "feels real good," and the child say, "does that feel good daddy" with an affirmative response from petitioner and his instruction to continue to count. Ms. Potter then testified that she heard the child say, "you got it all over my hand" and petitioner respond, "yes, I got it all over you didn't I." Ms. Potter started crying, ran from her home, went next door and telephoned the police.

Specialist Wilson received Ms. Potter's telephone call and at his request she came to the police department where a written report was prepared, Exhibit 1.

The following day, October 22, 1987, the officer spoke with the child's mother and the child was removed from the home to a relative's residence without revealing the reason to petitioner. On October 23, 1987, the policeman spoke with petitioner but the content of that discussion is not reported. That same day Specialist Wilson spoke with the child and her mother and they were taken by the officer to be interviewed by a social-worker member of the sexual abuse intervention team for the Hamilton County Department of Human Services. An interview of the child was conducted by the social worker, in the presence of the officer, of approximately 30-to-40 minutes. The content of that discussion, the circumstances of the interview, and any information pertaining to the interview is not in the record. The child and her mother were taken by officer Wilson to Children's Hospital where the child was examined by Dr. Saluke.

Before trial a hearing was conducted by the Court of Common Pleas on April 5, 1988, approximately five months after the alleged abuse, to examine the child, then five years of age, to determine her competency to testify pursuant to Ohio Evid.R. 601(A). The child's testimony bears remarkable similarity to the events described by Ms. Potter in her written statement, Exhibit 1, and her subsequent trial testimony.

The child recalled the past Halloween (the period of the criminal allegation) and that in that period she went to a hospital, talked with doctors, remembered pictures,

or drawings, presented to her at the competency hearing and that she had placed marks on those drawings. (The drawings were not identified or introduced into evidence and they are not of record in this case. Thus some assumption is necessary in the subsequent discussion of the dialogue between prosecutor and child).

Referring to a drawing (apparently of the genitals) the child was asked if that was a "pee pee" and she responded that she didn't know. When asked whether she had been touched in the genital area she replied, "no" and offered no reason for why she had circled a portion of the drawing exhibited to her. (It is assumed that the exhibited drawing depicted genitals which were circled). She further stated that she had not seen that part of her "daddy" before and that no one had touched that part of her body in the past.

The child did not recall the names of persons with whom she met, but recalled meeting with hospital personnel. She did not remember telling anyone that her father had her touch his penis. The child did not recall telling someone that "white stuff" came from "daddy's pee pee," explaining that it was bubbles, and she didn't know whether the bubbles came from his penis. Responding to where it happened, she said it was in the bathtub and that her father told her to count to 100, but she counted to 11. Asked whether the bubbles ever got on her hands, she replied, "no" and that she had never told anyone that it had. She stated that she had never touched her father's penis with her hands and that he had never asked her to do so.

At that point, and without the opportunity for petitioner to inquire of the child, the trial court terminated the examination and excused the child, precluding any examination by petitioner. The trial court ruled that the child understood the difference between truth and falsity and that she was a bright little girl. The judge held: "[t]he problem is she just can't relate what happened in this instance two years ago if it did occur, and for that reason I can't find her competent under Rule 601 to testify as a witness under this test." The court, however, was in error in two significant respects: the alleged offense was alleged to have happened a little over five months before the competency hearing, not two years before that hearing; and the child did relate the place of the alleged abuse, that she was asked to count and did count as stated in Exhibit 1, the Potter statement, that she visited a hospital and met with hospital personnel during the period of Halloween, from which her testimony clearly established her ability to relate what happened and that she recalled with clarity the event discussed, albeit she denied that there was any sexual abuse.

The Court of Appeals affirmed petitioner's conviction in its opinion released January 31, 1990, on the authority of *State* v. *Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), decided during the pendency of petitioner's appeal. However, the appellate court disregarded the Ohio admissibility test requiring specific and independent evidence of physical or emotional abuse and concluded that "the trial court precluded the victim from testifying because she could not remember the events constituting the alleged crime." (Appendix G, App. 60). The record, however, does not support a finding from

which one can conclude that the child could not remember the events; rather an inference was erroneously drawn by the Ohio courts that while the child remembered things very well her statement that nothing happened prompted the erroneous conclusion that the child didn't remember the events which constituted an assumed crime. A lack of memory of the subject matter to qualify the child as an unavailable witness pursuant to Ohio Evid.R. 804(A)(3) was not warranted from the record.

Following this Court's remand of the case to the Court of Appeals for further consideration in light of *Idaho* v. *Wright*, 497 U.S. ___, 110 S.Ct. 3139 (1990), that court in its decision released June 5, 1991, reversed petitioner's conviction recognizing that petitioner was "denied his right of confrontation under the Sixth Amendment to the United States Constitution when it admitted, over his objection, the hearsay statements of a child declarant made to a physician." (Appendix C, App. 38). Based upon the circumstances surrounding the statement, the appellate court held that it lacked a particularized guarantee of trustworthiness under the factors outlined by *Idaho* v. *Wright, supra*, and that the statement was not admissible under a firmly rooted hearsay exception such as Ohio Evid.R. 803(4) because the prosecution failed to discharge its burden of establishing that the declarant's motive to make the statement was to obtain medical treatment.

The Court of Appeals observed in its decision that the trial court relied upon the authority of *United States* v. *Renville*, 779 F.2d 430, 438-439 (8th Cir., 1985), for the admission of Dr. Saluke's testimony of the declarant's

statement although the *Renville* decision did not dispense with the requirement that the declarant must be motivated by a desire to obtain treatment or diagnosis. That court further noted that the Supreme Court of Ohio in *State* v. *Boston* had not dispensed with the Ohio Evid.R. 803(4) requirement that the child must have been motivated by her desire for medical diagnosis or treatment to support admission of the statement. The appellate court held that the child must have understood the need to obtain the perpetrator's identity for purposes of medical treatment and diagnosis before her statement could be admitted into evidence and the record in this case discloses no comprehension on the part of the child, and, although the physician explained the purpose for her questions to the child, the doctor was unable to recall whether the child understood what had been explained to her, from which the record contains an insufficient basis upon which the trial court could admit the out-of-court declaration.

In a split opinion, the writer for the majority of the Supreme Court of Ohio, states that in the circumstances of this case, Ohio Evid.R. 803(4) is a firmly rooted hearsay exception through the application of *White* v. *Illinois*, 502 U.S. ___, 112 S.Ct. 736 (1992). *Cf. State* v. *Dever*, 64 Ohio St.3d 401, 404-405, 596 N.E.2d 436, 440 (1992). The majority opinion acknowledged that in the former decision of *State* v. *Boston*, 46 Ohio St.3d 108, 121, 545 N.E.2d 1220, 1233 (1989), the admissibility of statements pursuant to Evid.R. 803(4) was depended upon the motivation of the declarant to make the statement, resting on the belief that the declarant's subjective motive generally guarantees the

statement's trustworthiness. *State* v. *Dever*, 64 Ohio St.3d, 407, 596 N.E.2d, 441-442.

The majority continues a lengthy discussion that the trial court should consider the circumstances surrounding the making of the statement, whether the child has been influenced, whether the statement was in response to suggestive or leading questions or any other factors which would affect the reliability of the statement, and if no such factors exist the statement should be admitted. *State* v. *Dever*, 64 Ohio St.3d, 410-411, 596 N.E.2d, 443-444. Continuing, the majority states that if the trial court discerns existence of sufficient factors indicating the statement was not made for medical purposes then the statement must be excluded as not within Evid.R. 803(4). 64 Ohio St.3d, at 411, 596 N.E.2d, at 444.

The majority opinion states that it finds evidence of the child's motivation in the record, but offers no support for the proposition other than that Dr. Saluke testified she followed the customary procedure of explaining to Kristen why she was asking questions. *State* v. *Dever*, 64 Ohio St.3d, 412, 596 N.E.2d, 445. The Court further stated that the Court of Appeals was heavily influenced by Dr. Saluke's testimony that she could not recall the child's response to the explanation for the need for the questioning. 64 Ohio St.3d, at 412, 596 N.E.2d, at 445. The majority cautions that a court should not presume that statements are unreliable merely because there is no indisputable evidence of the child's motivation. 64 Ohio St.3d, at 412, 596 N.E.2d, at 445. However, it is such conjecture which presumes reliability and trustworthiness of the statements where there is no evidence presented by the prosecution of what transpired between social worker and

child during that interview before the Saluke examination, what occurred during the period that the child's mother had left the examining room and Dr. Saluke obtained the claimed statement from the child, and a myriad of circumstances during a day of interviewing a young child, most of which is not in this record.

The key to the whole issue is stated by the majority in its comparison between Ohio Evid.R. 807 and 803(4), 64 Ohio St.3d, 414, 596 N.E.2d, 446-447:

> The test contained in Evid.R. 807 has a purpose different from the test discussed here. Evid.R. 807's "totality of the circumstances" test is designed specifically with Confrontation Clause requirements in mind. See Staff Note to Evid.R. 807. On the other hand, the test under Evid.R. 803(4) goes solely to whether a statement was made for purposes of medical diagnosis or treatment. If a statement is made for purpose of diagnosis or treatment, it is admissible pursuant to Evid.R. 803(4).

The record reflects that Diane Potter's statement to the police was supplied to the social worker, but the record is silent as to Specialist Mike Wilson's discussions, directions and characterizations to that social worker. The record is further silent as to what transpired during a 30-to-40-minute interview of the child by a social worker in officer Wilson's presence and as to what transpired following the mother's departure from the examining room and the resumption of the questioning of the child by Ann Saluke, M.D. as those interviews would bear upon the respondent's obligation to establish an indicia of reliability and some guarantee of trustworthiness to the

hearsay statements purported to have been made by the child to a physician and recited at trial.

REASONS FOR GRANTING THE WRIT

I. **THIS CASE PRESENTS AN IMPORTANT QUESTION OF PETITIONER'S RIGHT OF CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES BY THE ADMISSION OF TESTIMONY, PURSUANT TO RULE 803(4), OHIO RULES OF EVIDENCE, IN PETITIONER'S TRIAL, OVER HIS OBJECTION, FROM A PHYSICIAN CONCERNING STATEMENTS MADE TO THAT PHYSICIAN BY A YOUNG CHILD PERTAINING TO SEXUAL ABUSE AND THE IDENTIFICATION OF THE ALLEGED PERPETRATOR, WHERE THERE WAS NO EVIDENCE OF ABUSE OR PHYSICAL OR EMOTIONAL INJURY, NO EVIDENCE OF THE CHILD-DECLARANT'S MOTIVE IN MAKING THE STATEMENTS, FOR WHICH THE EVIDENCE WAS THAT THE CHILD DID NOT UNDERSTAND THE PURPOSE FOR QUESTIONS AND EXAMINATION, RESULTING IN NO EVIDENCE BEFORE THE TRIAL COURT THAT THE STATEMENT BY THE CHILD POSSESSED ANY INDICIA OF RELIABILITY, ESTABLISHED A PARTICULARIZED GUARANTEE OF TRUSTWORTHINESS, OR MET THE FIRMLY ROOTED PURPOSE OF A RULE 803(4) ADMISSION, IN WHICH THE ADMISSION OF THAT HEARSAY DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE CONFRONTATION CLAUSE.**

Petitioner seeks a review by this Court to recognize his deprivation of confrontation in a criminal prosecution

as granted to him by the Sixth Amendment of the Constitution of the United States and as the Confrontation Clause is made applicable to the states by the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U.S. 400, 403, 406 (1965).

Prior to trial and during a witness-competency hearing the court terminated the examination and released the child witness precluding petitioner from making any inquiry or otherwise exercising his right of confrontation. During the trial, over petitioner's objection on hearsay and Confrontation Clause repugnancy grounds, the examining physician, who found no evidence of any physical or emotional sexual abuse and concluded that there was neither confirmed nor disproved sexual abuse, was permitted to state what the child had allegedly told that physician, including the identity of the alleged perpetrator, petitioner. The physician's testimony was received by the trial court pursuant to Ohio's Evid.R. 803(4). However, the respondent offered no evidence to support an indicia of reliability and a particularized guarantee of trustworthiness of the child's statement to the physician, relying solely upon the hearsay exception codified in Ohio Evid.R. 803(4). Significantly, the physician could not state that the child, age four and one-half years, understood or appreciated the purpose for the questions or examination, or in any manner responded with a motive which sought medical treatment.

The prosecution, who carries the burden under the Confrontation Clause to establish the admissibility of an out-of-court declaration, failed to discharge its burden in either one or two of the methods recognized to satisfy the Confrontation Clause. First, by a showing that the child was motivated to seek treatment through establishing

evidence that the motivational component of Evid.R. 803(4) was present. Second, if the respondent could not establish the motivational component required to utilize Evid.R. 803(4), then the prosecution was obligated to establish that the out-of-court declaration possessed a degree of reliability and a guarantee of trustworthiness to afford admissibility of the statement.

A four and one-half-year-old child possessing no apparent or discernible injury, physical or emotional, of whom the record reflects does not understand the purpose for the questions and examination, is not an individual to whom her statement can be ascribed as reliable and trustworthy in responses to questions by a physician in accord with the purpose for a firmly rooted hearsay exception recognized by Evid.R. 803(4). Further, the failure to show a particularized guarantee of trustworthiness and the presence of some indicia of reliability by the respondent deprives petitioner of his right of confrontation.

Statements made to a physician during examination for purposes of medical diagnoses and treatment are traditionally trustworthy and reliable as recognized under the common law and as codified by Ohio's Evid.R. 803(4) and its counterpart in federal courts, and in several states. *Idaho* v. *Wright*, 497 U.S. ___, 110 S.Ct. 3139, 3147 (1990), recognizes that the "medical treatment" exception to the hearsay exclusion codified in Evid.R. 803(4), when properly applied, provides an indicia of reliability sufficient to remove Confrontation Clause infirmity. This Court in its decision in *White* v. *Illinois*, 502 U.S. ___, 112 S.Ct. 736, 741-742 (1992), where the principal contention

was a claim that the Confrontation Clause had been violated by Illinois' failure to either produce the declarant at trial or the declarant be found unavailable, observed that spontaneous declarations and "statements made in the course of receiving medical care" are out-of-court declarations made in contexts that provide substantial guarantees of their trustworthiness. The essence of an Evid.R. 803(4) admission is based upon the fabric that "a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony." *White* v. *Illinois*, 112 S.Ct., at 743. The issue of the circumstances under which Evid.R. 803(4) may be applied was not raised nor decided by *White* v. *Illinois, supra.*

The child's unavailability for cross-examination precluded petitioner from testing her truthfulness. *California* v. *Green*, 399 U.S. 149, 159 (1970). While the two-prong constitutional standard announced by *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), has been modified by *White* v. *Illinois, supra*, that in certain circumstances the proponent of the statement no longer has the burden of a good-faith effort to produce the declarant, but the second portion of the standard remains: the proponent of the proposed hearsay statement must establish sufficient indicia of reliability to satisfy the fundamental reason and policy of the hearsay exception being used.

The essence of the Confrontation Clause issue raised here is the admission of the child's statement through Dr. Saluke absent any evidence of a "particularized guarantee of trustworthiness;" the child's statement does not

have the motivation component for admission under Evid.R. 803(4) as a firmly rooted exception to the hearsay rule, and the statement does not have a sufficient indicia of reliability to satisfy the essential policy and reason of the hearsay exception utilized for admission. *Cf. Ohio* v. *Roberts*, 448 U.S., at 66. Frustration of the purpose of Evid.R. 803(4) to carve from it a rule of trustworthiness never within its basic rationale does not pass Confrontation Clause muster.

There is no indicia of reliability and no guarantee of trustworthiness of the declarant's statement in the record which is within the purpose and scope of Evid.R. 803(4), or any showing by respondent of independent evidence supporting an indicia of reliability.

The " 'medical treatment' exceptions to the hearsay rule are based upon the belief that the persons making such statements are highly unlikely to lie." *Idaho* v. *Wright*, 110 S.Ct., at 3149. The record here demonstrates total inability to ascribe an understanding and related truthfulness of the child's statement to Dr. Saluke. This record fails to establish any factor which "relate[s] to whether the child declarant was particularly likely to be telling the truth when the statement was made," [110 S.Ct., at 3150] especially where in considering the circumstances of the interview, there is a failure by the prosecution to establish the underlying rationale of Evid.R. 803(4) for admission of the statement.

To remove Confrontation Clause violation the hearsay admitted must be so trustworthy that cross-examination of the declarant would be of marginal utility. 110

S.Ct., at 3150. Cross-examination of the declarant as identified by this record was simply not of marginal utility, especially where the child's competency hearing testimony is compared with the testimony and written statement of Ms. Potter. The prosecution, as proponent for the admission of the out-of-court declaration, failed to supply as evidence any information pertaining to what transpired during the social worker interview of the child, failed to supply as evidence the dialogue and circumstances present between child and Dr. Saluke during the period following the mother's departure from the examining room and declaration stated by the physician at trial, and the absence of any background supplied by the proponent leading to the declarant's statement which were factors bearing upon petitioner's Confrontation Clause challenge. *Cf.* 110 S.Ct., at 3150.

The circumstances presented by this record establish that the respondent failed to show a motivational component for the child's statement to Dr. Saluke which would qualify as a firmly rooted exception to the hearsay rule and thus inherently trustworthy, or that the statement otherwise possessed sufficient "particularized guarantee of trustworthiness" under the Confrontation Clause to overcome the presumption of inadmissibility. 110 S.Ct., at 3152-3153.

Petitioner was twice deprived of his right of confrontation: at the competency hearing (the trial court precluded petitioner from cross-examining the witness, implicating *Davis* v. *Alaska*, 415 U.S. 308 (1974)) and in the admission of Dr. Saluke's testimony of the child's statement at trial absent any foundation of the circumstances

required to establish the reliability of the hearsay statement except that the statement was made to a physician which is indistinguishable from the facts of *Idaho* v. *Wright, supra*. The harm from the admission of the hearsay statement from which petitioner was found guilty and imprisoned is captured in this record within the brevity of Dr. Saluke's testimony of the child-declarant's statement consisting of three sentences in the record, is that it poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. *Lee* v. *Illinois*, 476 U.S. 530, 545 (1986); *Idaho* v. *Wright*, 110 S.Ct., at 3151.

The issue addressed by petitioner is that to satisfy the Sixth Amendment of the United States Constitution in the admission of a young child's out-of-court statement to a physician, where the right to confront that child-witness is denied, there must be a showing by the proponent of the declaration that the child understood the purpose for the questions seeking the statement and was motivated to tell the truth for purposes of receiving the assumed medical treatment to satisfy the rationale underlying Evid.R. 803(4). There is no evidence on this record that respondent ever discharged that burden.

The verdict of guilt was sustained only by the child-declarant's statement. The admission of that statement was repugnant to the Confrontation Clause of the Sixth Amendment and cannot be deemed harmless error. *Chapman* v. *California*, 386 U.S. 18 (1967).

II. THE CONFRONTATION CLAUSE IMPOSES A BURDEN UPON THE PROPONENT FOR THE ADMISSION OF AN OUT-OF-COURT DECLARATION TO ESTABLISH FROM ALL THE CIRCUMSTANCES AT THE TIME THE DECLARATION WAS MADE THAT THERE IS AN INDICIA OF RELIABILITY AND A PARTICULARIZED GUARANTEE OF TRUSTWORTHINESS PRESENT BEFORE THE STATEMENT CAN BE ADMITTED, AND WHERE AN APPELLATE COURT CHANGES THAT BURDEN FROM THE PROPONENT TO THE PETITIONER TO ESTABLISH THAT THE STATEMENT IS UNRELIABLE AND UNTRUSTWORTHY, SUCH A BURDEN SHIFT VIOLATES THE CONFRONTATION CLAUSE AND THE DUE PROCESS OF LAW CLAUSE IN THE SIXTH AND FOURTEENTH AMENDMENTS.

The Supreme Court of Ohio acknowledged by its decision in *State* v. *Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), that it required proof of the motivational requirement for admission of out-of-court declarations pursuant to Evid.R. 803(4), which under Ohio's Evid.R. 102 required that the evidence rule comply with the common law. *State* v. *Dever*, 64 Ohio St.3d 401, 406-407 (1992). Furthermore, the *Dever* Court, 64 Ohio St.3d, at 408, 596 N.E.2d, at 442, states that Ohio's Evid.R. 803(4), as adopted, did not dispense with the common-law motivational component, and that Ohio Evid.R. 102 requires Ohio courts to apply the common law. See, *State* v. *Boston*, 46 Ohio St.3d, at 120-122, 545 N.E.2d, at 1232-1234.

During the course of the majority opinion it becomes clear that on one hand the court suggests that there was motivational compliance with Evid.R. 803(4), while on the

other hand arguing that unless Evid.R. 102 is relaxed no child's out-of-court statement will be admissible. Further, the majority points to Ohio's Evid.R. 807 as complying with Confrontation Clause principles, but Evid.R. 803(4) being less restrictive. See, *State* v. *Dever*, 64 Ohio St.3d, at 414, 596 N.E.2d, at 446-447.

The *Dever* court leaves to the trial judge the role of considering whether the statement was in response to suggestive or leading questions or any other factor without concern for the burden to be discharged by the proponent for the admission of the statement. 64 Ohio St.3d, at 410, 596 N.E.2d, at 444.

There was no relevant evidence submitted by respondent of what had occurred during the child's interviews by police and social workers as that interval of questioning might support some indication that the purpose for the "medical treatment" exception to the hearsay rule has been fulfilled, or to the contrary that silence on the subject of that episode may infer manipulation and coaching. It is the responsibility of respondent, as proponent for the admission of the child-declarant's statement, to qualify such statement as an Evid.R. 803(4) exception to satisfy compliance with petitioner's rights under the Confrontation Clause.

This Court in *Idaho* v. *Wright*, 497 U.S. ___, 110 S.Ct. 3139, 3150 (1990), sets forth decisions from state and federal appellate courts concerning factors which relate to whether a child-declarant's statements in child sexual abuse cases are reliable. Spontaneity and consistent repetition by the child is absent from this record. The mental state and motivation of the child-declarant in this case

was never established by respondent. The terminology used by petitioner's child of "pee pee," "mouth," "white stuff," "yucky taste," and "mashed potatoes with butter" is not the use of terminology inconsistent with a four and one-half-year-old child, or is it an indication that she utilized sexual terminology, or experienced a sexual episode, which was advanced for her years and of which she would have had no knowledge unless it had been experienced. Respondent failed to pursue any information or evidence of the lack of prior conditioning of the child or lack of motive to fabricate.

The burden was, and remains, upon respondent to produce evidence of what transpired with the child during the social-worker interview to remove questioned manipulation and coaching. Respondent was obligated to produce evidence that the child understood the purpose for questioning and examination by the physician and was motivated to tell the truth to obtain medical diagnoses and treatment to qualify the declarant's statements as within the purview of Evid.R. 803(4) rationale. Silence, or speculation, on the subject does not satisfy respondent's burden for establishing an indicia of reliability and a particularized guarantee of trustworthiness for admission of the child-declarant's statements.

The Ohio Supreme Court states that the record supports the trial court's determination that the requirements of Evid.R. 803(4) were met (64 Ohio St.3d, 413, 596 N.E.2d, 446); that the child's motivation is not the sole focus of Evid.R. 803(4) inquiry, the court "find[s] evidence of the child's motivation in the record, as revealed in Dr. Saluke's testimony" (64 Ohio St.3d, 412, 596

N.E.2d, 445); the trial court should consider the circumstances surrounding the making of the hearsay statement (64 Ohio St.3d, 410, 596 N.E.2d, 444); but that court fails to state any factor from which the motivational component of Evid.R. 803(4) was met or otherwise any factor supporting an indicia of reliability and a guarantee of trustworthiness, and most significantly and contrary to the finding of the Court of Appeals, the total failure of respondent to support its burden that the motivational component had been met or the satisfaction of the burden of reliability and trustworthiness of the out-of-court declaration.

The Confrontation Clause requires that the prosecution establish the out-of-court declaration as being reliable and trustworthy and if the state cannot sustain that burden the declaration is inadmissible. *Idaho* v. *Wright*, 497 U.S. ___, 110 S.Ct. 3139 (1990). In this case the Supreme Court of Ohio requires the opposite: petitioner must show that the declaration was unreliable and untrustworthy. The Ohio Supreme Court engages in inferences and presumptions pertaining to the reliability and trustworthiness *vel non* of an out-of-court declaration.

Where the burden of production and the ultimate burden of persuasion is shifted from respondent to petitioner, not only is the Confrontation Clause violated but there is a classic Due Process of Law Clause repugnancy. See *Sandstrom* v. *Montana*, 422 U.S. 510, 518-519 (1979); *cf. Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). "The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *Francis* v. *Franklin*, 471

U.S. 307, 313 (1985), quoting *In re Winship*, 379 U.S. 358, 364 (1970). The burden shift for the admission of critical evidence is no different in kind and character from evidentiary presumptions in a jury charge that has the effect of relieving the prosecution of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.

III. WHERE THE PETITIONER PROCEEDS TO TRIAL IN WHICH A FUNDAMENTAL RULE OF EVIDENCE LIMITS THE CONSTRUCTION OF THE RULES OF EVIDENCE TO THE COMMON LAW CONSTRUCTION AND FOR THE FIRST TIME ON APPELLATE REVIEW THE SUPREME COURT FOR THE STATE OF OHIO ALTERS THAT RULE TO PERMIT THE ADMISSION OF AN OUT-OF-COURT DECLARATION WHICH WOULD NOT HAVE BEEN ADMITTED AT TRIAL IF THE EVIDENCE RULES WERE COMPLIED WITH, THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW HAS BEEN VIOLATED.

Petitioner was tried and his conviction reversed by the appellate court on the basis of the application of Evid.R. 102 and Evid.R. 803(4) which required that respondent discharge its burden under the Confrontation Clause that the out-of-court statement by a child was reliable and trustworthy either by producing evidence that the statement was made by the child to a physician seeking medical aid or that the circumstances surrounding the statement established that at the time the statement was uttered, by the proof offered, there was an indicia of reliability and a guarantee of trustworthiness

sufficient to remove the need for adversarial testing of the statement.

The record in this case does not support a conclusion that the prosecution presented evidence of either the motivational component of Evid.R. 803(4) being present or that the child's statement otherwise possessed an indicia of reliability and a guarantee of trustworthiness.

The Supreme Court of Ohio changed the standard and the burden for consideration of reliability and trustworthiness on appeal from the standard and burden upon which petitioner was tried and such a change constitutes a denial of due process of law in the retroactive application of the standard and burden change. *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964).

CONCLUSION

For the reasons set forth, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The Supreme Court of Ohio

1992 TERM

To wit: September 30, 1992

State of Ohio, Appellant,	:	Case No. 91-1498
v.	:	REHEARING ENTRY
Frederick Dever, Jr., Appellee.	:	(Hamilton County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. C880812)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

THE STATE OF OHIO, APPELLANT, *v.* DEVER, APPELLEE.

[Cite as *State v. Dever* (1992), 64 Ohio St.3d 401.]

Criminal law – Sexual abuse of child – Admissibility of child declarant's statements – Admission into evidence of a hearsay statement pursuant to a firmly rooted hearsay exception does not violate a defendant's right of confrontation – Evid.R. 803(4), applied.

1. A trial court does not abuse its discretion when it admits a child declarant's statements made for the purpose of medical diagnosis or treatment pursuant to Evid.R. 803(4), without first establishing the child declarant's unavailability to testify. (*State v. Boston* [1989], 46 Ohio St.3d 108, 545 N.E.2d 1220, modified.)

See: West's Ohio Digest, Criminal Law – 367.

2. Statements made by a child during a medical examination identifying the perpetrator of sexual abuse, if made for purpose of diagnosis and treatment, are admissible pursuant to Evid.R. 803(4), when such statements are made for the purposes enumerated in that rule.

See: West's Ohio Digest, Criminal Law – 367.

3. The admission into evidence of a hearsay statement pursuant to a firmly rooted hearsay exception does not violate a defendant's right of confrontation. (*White v. Illinois* [1992], 502 U.S. ___, 112 S.Ct. 736, 116 L.Ed.2d 848, followed.)

See: West's Ohio Digest, Criminal Law – 662.8.

(No. 91-1498 – Submitted April 28, 1992 – Decided August 19, 1992.)

APPEAL from the Court of Appeals
for Hamilton County, No. C-880712.

At approximately 10:00 p.m. on October 21, 1987, Diane Potter, who lived on the second floor of a multi-family residence in Mariemont, Ohio, overheard a conversation by tenants on the first floor of the building. The tenants of the first floor were defendant-appellee Frederick M. Dever, Jr., his wife, and their daughter Kristen, age four and one half, who had been adopted by appellee. Dever's wife was not at home during the time in question. Potter testified at trial that the ductwork in the building often carried sounds from the first floor up to her living area, so that she could clearly hear what was said in the apartment below. Potter testified:

"I heard Kristen crying and I heard Fred saying come on, come on, it will only take you a minute and Kristen kept saying no, daddy, I'm sleeping and he kept saying come on, Kristen, come on, it is only going to take a minute. She said no, daddy, I'm sleeping and then finally she said okay and I guess – I could hear them talking and it was just mumbling and it seemed like it was getting closer but I wasn't really paying attention at that time because I figured, I didn't really know what he was getting her up for but I figured it was something she had to do."

Potter further testified that she was in her bathroom when she heard the following coming from the Devers' bathroom below:

"Then I heard them talking. I heard Fred groaning, he groaned three times very loudly and that was what made me really start listening, I didn't turn on the water, I just

listened and I heard him tell Kristen to count to 600 and I heard her counting and then he said oh, that feels so good and she said oh, does that feel good, daddy, and he said yes and then he told her to keep counting and she stopped and he said come on, just count to 20, just count to 20 and she said no, I don't want to. I could hear mumbling and then I heard her say oh, daddy, you got it all over my hand and he said yes, I got it all over you, didn't I, and then I just left the house, I went next door and called the police."

Potter went to the police station and filed out a report on the incident that same night. The next day, Dever's wife was informed of the allegations, and cooperated in removing Kristen from Dever's presence. On October 23, the following day, the sexual abuse intervention team of the Hamilton County Department of Human Services became involved. Kristen was taken to Children's Hospital where she was seen by Dr. Ann Saluke, M.D.

Dr. Saluke's physical examination of Kristen did not disclose any physical signs of recent sexual conduct. However, during the course of the consultation, Kristen told Dr. Saluke of the events that had recently occurred, and identified Dever as the perpetrator.

Dever was charged with one count of rape, in violation of R.C. 2907.02, and one count of gross sexual imposition, in violation of R.C. 2907.05. The case proceeded to jury trial. At a pretrial hearing, the trial judge considered whether Kristen was competent to testify. Despite finding that Kristen understood the difference between truth and falsehood, the trial judge decided that Kristen would be

unable to relate the events in question at the trial, and so did not find her competent to testify, pursuant to Evid.R. 601.

A crucial issue at trial was whether Dr. Saluke should be permitted to testify to what Kristen had related during the course of the medical examination. Dever made a motion *in limine* to prohibit Dr. Saluke from testifying as to what Kristen told her. The trial judge, specifically relying on *United States v. Renville* (C.A.8, 1985), 779 F.2d 430, indicated that he believed the testimony was admissible, but did not rule on the motion at that time.

At trial, and over Dever's objection, Dr. Saluke was permitted to repeat Kristen's statements to the jury pursuant to Evid.R. 803(4), the medical diagnosis or treatment exception to the hearsay rule. Dr. Saluke testified:

"Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as the pee pee."

After deliberations, the jury returned verdicts of guilty on both counts. The trial judge found that the counts were allied offenses of similar import and merged them, sentencing Dever only on the rape count.

Upon appeal, Dever argued that the trial court erred by allowing Dr. Saluke to testify regarding Kristen's statements. The court of appeals affirmed the conviction, but recharacterized the trial judge's finding that Kristen was not competent to testify (see Evid.R. 601) as a finding that Kristen was unavailable to testify (see Evid.R.

804[A][3]). The court of appeals further found that there was a "guarantee of trustworthiness" in the circumstances surrounding the child's statements which satisfied the standards of *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220.

Dever appealed that decision to this court, which overruled his motion for leave to appeal. 52 Ohio St.3d 701, 556 N.E.2d 526. Dever's motion for rehearing was also denied. 53 Ohio St.3d 706, 558 N.E.2d 62.

Dever then appealed to the United States Supreme Court which vacated the judgment of the Hamilton County Court of Appeals, and remanded the cause to the appellate court for further consideration in light of *Idaho v. Wright* (1990), 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638. *Dever v. Ohio* (1990), 498 U.S. ___, 111 S.Ct. 575, 112 L.Ed.2d 581.

In a split decision, the court of appeals reversed the judgment of the trial court, and remanded the cause for a new trial. The majority decided that the record did not support a conclusion that Kristen's statements were motivated by her own desire for medical diagnosis or treatment. The dissenting judge would have approved admitting Kristen's hearsay statements under Evid.R. 803(4).

The cause is now before this court upon the allowance of a motion for leave to appeal.

Arthur M. Ney, Jr., Prosecuting Attorney, and *Christian J. Schaefer*, for appellant.

Andrew B. Dennison, for appellee.

Alice Robie Resnick J. This case presents the continuing problem of reaching just results in child abuse cases involving statements made by young children during the course of a medical examination. We must consider the admissibility of the statements at trial pursuant to the hearsay exception contained in Evid.R. 803(4). The principal dilemma arises in attempting to apply to children evidentiary rules which were drafted with adults in mind. In applying these rules of evidence to children, we encounter considerable problems in devising a reasonable and workable application. Nevertheless, we continue to strive for balance in this troublesome area of the law. As was noted in *State v. Boston, supra*, 46 Ohio St.3d at 113, 545 N.E.2d at 1226: " * * * [I]t is the goal of all the members of the judiciary that results are reached that are equitable and fair to both society and defendants who find themselves charged with the crime of child abuse."

In considering the circumstances in the instant case, we must address two principal issues: (1) Did the trial judge abuse his discretion in allowing Dr. Saluke to repeat at trial statements Kristen made to her during the

medical examination as an Evid.R. 803(4) hearsay exception?[1] and (2) What, if any, is the impact of the Confrontation Clause of the Sixth Amendment to the United States Constitution[2] on our inquiry?

For the reasons which follow, after careful consideration, we resolve the first issue by finding no abuse of discretion on the part of the trial judge in admitting the hearsay testimony pursuant to Evid.R. 803(4). As to the second issue, we determine that Evid.R. 803(4), as applied to the circumstances of this case, is a firmly rooted hearsay exception; we apply the analysis contained in *White v. Illinois* (1992), 502 U.S. ___, 112 S.Ct. 736, 116 L.Ed. 848, to that conclusion; and we find no violation of Dever's right of confrontation. We therefore reverse the judgment of the court of appeals, and reinstate Dever's conviction.

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[1] Evid.R. 803 reads:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

"* * *

"(4) Statements for Purpose of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

[2] The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

The Confrontation Clause of the Sixth Amendment is made applicable to the states by the Fourteenth Amendment to the United States Constitution. *Pointer v. Texas* (1965), 380 U.S. 400, 406, 85 Ct. 1065, 1069 13 L.Ed.2d 923, 928.

I

The initial issue for our consideration is whether the trial court abused its discretion in admitting into evidence Kristen's hearsay statement to Dr. Saluke under Evid.R. 803(4). A related question, which directly affects the Confrontation Clause issue presented in Part III of this opinion, is whether the Evid.R. 803(4) exception, in the circumstances of this case, is a firmly rooted hearsay exception.

Because this court wrestled with many issues raised in similar circumstances in *State v Boston, supra,* a detailed examination of that case is required.

A

Boston involved a defendant who was tried and convicted of gross sexual imposition based on an incident involving his two-and-one-half-year-old daughter. The defendant had been given weekend visitation rights with his daughter pending a divorce from his wife. After being with the father one weekend, the child awoke during the night screaming. The mother questioned the child who related, "Daddy put something up my bucket." Upon finding redness around the child's vagina and anus, the mother took the child to a doctor the next day. Although the doctor found no specific evidence of abuse, he referred the mother to Akron Children's Hospital. The director of the hospital's Child Abuse Team, a pediatrician, later examined the child. The child told the pediatrician that "Daddy put a telephone in here and it hurt." Based on the child's statements, her medical history, and the examination (which revealed a whitish discharge and

redness around the labia minora, and a hymenal opening larger than normal), the doctor made a diagnosis of probable vaginal penetration and possible rectal penetration. A psychologist, an expert in child sexual abuse, counselled the child, and determined that the child was not falsifying, and that she had been a victim of sexual abuse.

At defendant's trial, the prosecution attempted to present the child's testimony. The trial judge conducted a voir dire examination of the child, and found her incompetent to testify.[3] However, hearsay statements made by the child to her mother, to the doctor who had diagnosed probable vaginal penetration, and to the psychologist were admitted at trial. In addition, the court permitted opinion testimony that the child had not fantasized her accusation. The jury returned a verdict of guilty of gross sexual imposition, and the defendant was sentenced. Upon appeal, the court of appeals affirmed the judgment of conviction. *Id.*, 46 Ohio St.3d at 108-111, 545 N.E.2d at 1222-1225.

This court, in reversing the judgment of conviction and remanding to the trial court, addressed a number of evidentiary issues which arise within the context of a child abuse case.[4] Especially relevant to the instant case is

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[3] The court of appeals later recharacterized the determination of "incompetency" to testify as one of "unavailability" to testify, and the Supreme Court of Ohio, in *Boston* accepted that conclusion. *Id.*, 46 Ohio St.3d at 115, 545 N.E.2d at 1228.

[4] Among the many issues discussed in *Boston* which either are not relevant to the instant case, or will not be revisited, are: (1) a child's competency to testify as a witness and Evid.R. 601(A); (2) unavailability of a child witness and Evid.R.

Boston's discussion of Evid.R. 803(4), the hearsay exception involving statements made for purposes of medical diagnosis or treatment, including the motivational component of Evid.R. 803(4), the effect of Ohio's Evid.R. 102 on Evid.R. 803(4), and the admissibility of statements by a child identifying the perpetrator in an abuse prosecution.

B

Evid.R. 803(4) allows into evidence, as an exception to the hearsay rule, "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or

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804(A)(2); (3) the admissibility of excited utterances under Evid.R. 803(2) in child abuse prosecutions; (4) the use of expert testimony in child abuse cases, Evid.R. 702, 703, 704, and 705; (5) whether a statement by a child to someone other than a medical doctor can be admissible under Evid.R. 803(4), the medical diagnosis or treatment exception; (6) the application of Evid.R. 801(D)(1)(c), allowing prior statements by a witness into evidence as non-hearsay if the declarant also testifies at trial; and (7) whether it is proper for an expert witness to give an opinion of the veracity of the child's hearsay statements.

The resolution of the last issue above was the basis for the reversal of the conviction. The syllabus law announced in *Boston* reads: "An expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant."

We recognize a need for further clarification of some of these issues. However, we will confine our consideration to those issues pertinent to the case before us; the other issues must await another day.

external source thereof insofar as reasonably pertinent to diagnosis or treatment." Ohio's Evid.R. 803(4) is identical to Fed.R.Evid. 803(4).

In essence, *Boston* found that the admissibility of statements for medical treatment or diagnosis pursuant to Evid.R. 803(4) depends upon the motivation of the declarant to make the statement. "' * * * The rule's narrow limitation is based upon the belief that the declarant's subjective motive generally guarantees the statement's trustworthiness. Since the effectiveness of the treatment depends upon the accuracy of information given to the physician, the declarant is motivated to tell the truth. * * * ' " *Id.*, 46 Ohio St.3d at 121, 545 n.E.2d at 1233, quoting *State v. Eastham* (1988), 39 Ohio St.3d 307, 312, 530 N.E.2d 409, 413 (H. Brown, J., concurring). Serious problems arise in admitting the statements when a "child of tender years" is the declarant because that child will often not be personally motivated to seek treatment. " * * * [S]uch a young child is not giving the doctor the information for the purposes required by Evid.R. 803(4). More than likely, the child does not even want to be seeing the doctor[.]" *Boston, supra,* 46 Ohio St.3d at 122, 545 N.E.2d at 1234.

C

While *Boston* noted that many courts have applied Evid.R. 803(4) in child abuse prosecutions when the declarant is a young child without considering the motivational component of that hearsay exception, *Boston* concluded that such an interpretation is inconsistent with

Ohio's version of Evid.R. 102. *Id.*, 46 Ohio St.3d at 121-122, 545 N.E.2d at 1233-1234.

Fed.R.Evid. 102 states that the Federal Rules of Evidence shall be construed in order to promote the "growth and development of the law of evidence * * * ." In contrast, Ohio Evid.R. 102 states that Ohio's Rules of Evidence "shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended * * * ." *Boston* concluded that this significant difference between the two rules means that federal courts (or any court sitting in a state which has a rule identical to Fed.R.Evid. 102) are permitted to construe the rules of evidence broadly, but that Ohio courts may not do so. *Id.*, 46 Ohio St.3d at 116, 545 N.E.2d at 1229. See Staff Note to Ohio Evid.R. 102.

Boston, in commenting on a federal court decision that did not question whether a three-year-old child's motivation in telling a doctor about an abuse episode was relevant to the admissibility of the child's hearsay statements (*United States v. Nick* [C.A.9, 1979], 604 F.2d 1199), stated: " * * * [B]y discarding the motivational component of Evid.R. 803(4) * * * , the federal appellate court has rewritten the rule – or at least very liberally construed the rule to promote the ' * * * growth and development of the law of evidence * * * .' Fed.R.Evid. 102." *Boston*, 46 Ohio St.3d at 122, 545 N.E.2d at 1234.

D

Boston also raised the question whether Evid.R. 803(4) may be construed to allow into evidence a young child's statement identifying the perpetrator of the abuse.

Id., 46 Ohio St.3d at 123, 545 N.E.2d at 1235. Because *Boston* conditioned the admissibility of statements made by a child on the child's motivation to seek treatment, it was not necessary in that case to resolve that specific issue. If the child was not personally motivated to seek treatment, *Boston* found that *none* of the child's statements would be admissible pursuant to Evid.R. 803(4), including the statement identifying the perpetrator of the abuse. *Id.* at 122-123, 545 N.E.2d at 1234-1235.

In summary, *Boston* reasoned that the common-law hearsay exception for statements made for medical treatment stems from the declarant's motivation to speak the truth in order to obtain effective treatment. *Boston* also found that Ohio's Evid.R. 803(4), as adopted in 1980, did not dispense with the common-law motivational component. *Id.* at 121, 545 N.E.2d at 1233. Moreover, *Boston* found that the child declarant's statements to the pediatrician were not admissible pursuant to Evid.R. 803(4), because the motivational component was absent, and that the statements did not fall within a defined hearsay exception. *Boston* did find, however, that certain of the statements were admissible under *Ohio v. Roberts* (1980), 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597, 608, which requires a "particularized guarantee of trustworthiness." *Boston, supra*, 46 Ohio St.3d at 125-128, 545 N.E.2d at 1237-1239.[5]

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[5] *Boston* specifically called on the legislature to address the special problems presented by the hearsay statements of children in abuse cases. *Id.*, 48 Ohio St.3d at 115. 545 N.E.2d at 1228, Evid.R. 807 was subsequently adopted, effective July 1, 1991.

II

Boston, in noting that Ohio Evid.R. 102 requires an Ohio court to apply the common law unless a change clearly is intended, essentially found that no change from the common-law motivational requirement was intended, and hence concluded that the medical diagnosis or treatment hearsay exception will rarely apply when a child of tender years is the declarant. *Id.*, 46 Ohio St.3d at 120-122, 545 N.E.2d at 1232-1234. For the reasons which follow, we disagree with that conclusion reached in *Boston*, and modify *Boston* accordingly.

We are aware of the significant factual difference between the case at bar and *Boston*. *Boston* involved allegations of child sexual abuse which occurred in the context of a "bitter battle for custody." *Id.*, 46 Ohio St.3d at 108, 545 N.E.2d at 1222. For that reason, the possibility that the child's statements to professionals may have been programmed or influenced by the custody battle made those statements more suspect than the statements in the instant case. Although the *Boston* court did not approve the admission of the child's statements under Evid.R. 803(4), the court did ultimately find them admissible because they were sufficiently trustworthy. However, in the circumstances of this case, we find that the trial court did not err in finding that the child's statements were in fact admissible under Evid.R. 803(4).

A

The practical result of reading *Boston*'s rigid motivational requirement into Evid.R. 803(4) is that a young child's statements to a doctor in the course of a medical

examination will virtually never be admissible under that rule. While we do recognize that Evid.R. 102 significantly restricts our ability to interpret the Ohio Rules of Evidence,[6] we do not believe that Evid.R. 102 requires such a sweeping result.

Though we agree with *Boston* that "applying this [Evid.R. 803(4)] exception to this category of cases entails inherent problems[,]" *id.*, 46 Ohio St.3d at 121, 545 N.E.2d at 1234, we do not believe Evid.R. 102 mandates such a restrictive approach to these problems. *Boston* gives the impression that if the slightest possibility exists that the child's statements were not motivated by her own desire to obtain medical diagnosis or treatment, the statements may not come in as an Evid.R. 803(4) exception. We believe that it is not necessary to apply that approach to every instance in which a child of tender years makes a statement in the course of diagnosis and treatment. While

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[6] Perhaps the time has come to reevaluate Ohio's Evid.R. 102 as it now exists. While federal courts and courts of most states allow evolutionary development of the law of evidence, Ohio courts are required to apply the common law to evidence rules which are almost certainly inconsistent in spirit, if not in literal wording, with many of the common-law foundations. An amendment of Evid.R. 102, to put it in step with Fed.R.Evid. 102, is an idea whose time has come. The drafters of Ohio's Evidence Rules feared dire consequences if Ohio adopted an Evid.R. 102 identical to the federal version. See Walinski & Abromoff, The Proposed Ohio Rules of Evidence: The Case Against (1978), 28 Case W.Res.L.Rev. 344, 370 (arguing that Ohio's then-proposed Evid.R. 102, to be identical to Fed.R.Evid. 102, constituted a "disturbing feature" of the evidence rules). Ohio Evid.R. 102 was altered in response to such criticism, but the perceived horrors associated with the federal counterpart have not materialized.

we recognize that a young child would probably not personally seek treatment, but would generally be directed to treatment by an adult, we do not find that the child's statements relating to medical diagnosis or treatment are always untrustworthy for that reason alone. Once the child is at the doctor's office, the probability of understanding the significance of the visit is heightened and the motivation for diagnosis and treatment will normally be present. That is to say, the initial desire to seek treatment may be absent, but the motivation certainly can arise once the child has been taken to the doctor. Absent extraordinary circumstances, the child has no more motivation to lie than an adult would in similar circumstances. Everyday experience tells us most children know that if they do not tell the truth to the person treating them, they may get worse and not better. An overly strict motivational requirement for the statements of young children will almost *always* keep those statements out of evidence. That is not an acceptable balance of competing interests. We are unwilling to approve a rule which allows a person accused of abusing a young child (when there is no physical evidence of that abuse) to keep the child's statements to a doctor out of evidence simply because of a lack of initial motivation to seek treatment. In many situations, the statements of young children are sufficiently trustworthy and can appropriately be admitted pursuant to Evid.R. 803(4). See *State v. Larson* (Minn.1991), 472 N.W.2d 120; *People v. Meeboer* (1992), 439 Mich. 310, 484 N.W.2d 621. We further find that Evid.R. 102 does not foreclose that result.

We do not find that the common-law basis for the medical treatment exception to the hearsay rule, at least

where young children are concerned, is as specific as *Boston* found. Rather, the focus must be slightly different when a child is involved. The trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception. *State v. Rhodes* (1986), 23 Ohio St.3d 225, 229, 23 OBR 382, 385, 492 N.E.2d 430, 434; see, generally, *State v. Duncan* (1978), 53 Ohio St.2d 215, 7 O.O.3d 380, 373 N.E.2d 1234. The trial court should consider the circumstances surrounding the making of the hearsay statement. If the trial court finds in voir dire that the child's statements were inappropriately influenced by another, then those statements would not have been made for the purpose of diagnosis or treatment. This inquiry will vary, depending on the facts of each case. For example, the trial court may consider whether the child's statement was in response to a suggestive or leading question (as was the case in *Idaho v. Wright*), and any other factor which would affect the reliability of the statements (such as the bitter custody battle in *State v. Boston*). If no such factors exist, then the evidence should be admitted. The credibility of the statements would then be for the jury to evaluate in its role as factfinder. In addition, the witness whose testimony brings in the child's hearsay statement can be cross-examined about the circumstances surrounding the making of the statement. But if the trial court discerns the existence of sufficient factors indicating that the child's statements were not made for the purpose of diagnosis or treatment, the statements must be excluded as not falling within Evid.R. 803(4).

We find further support for our holding in that portion of Evid.R. 102 which allows a court to deviate from

the common law when "the rule clearly indicates that a change is intended * * * ." Prior to 1980, Ohio allowed into evidence hearsay statements in medical treatment situations only when the statements were specifically relevant to the doctor's *treatment* of the patient. See *Cleveland Ry. Co. v. Mark* (1932), 124 Ohio St. 596, 180 N.E. 51. When Evid.R. 803(4) was adopted in 1980, that rule changed the common law by also allowing into evidence hearsay statements for purposes of *diagnosis*. See Staff Note to Evid.R. 803(4); Palmer, Ohio Courtroom Evidence (1988) 23-12 to 23-13, Chapter 23. This change, making Ohio's Evid.R. 803(4) identical to Fed.R.Evid. 803(4), shows that a strict common-law interpretation of the hearsay exception for medical diagnosis or treatment is not appropriate in all situations.

In addition, the motivational element of Evid.R. 803(4) (often termed the "selfish interest" rationale) is not the only reason that statements for the purpose of medical diagnosis or treatment are more reliable than other hearsay statements. In *Renville, supra,* the court noted that there is a second reason for the medical diagnosis or treatment hearsay exception – that such statements are "reasonably relied on by a physician in treatment or diagnosis." *Id.*, 779 F.2d at 436. See, generally, Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment (1989), 67 N.C.L.Rev. 257. See, also, 2 McCormick on Evidence (4 Ed.1992) 250 ("The general reliance upon 'subjective' facts by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms. Within the medical profession, the analysis of the rule appears to be

that facts reliable enough to be relied on in reaching a diagnosis have sufficient trustworthiness to satisfy hearsay concerns.").

Because the Ohio version of Evid.R. 803(4) allows the admission of hearsay statements made for the purpose of *diagnosis,* it is apparent that this reliance factor is also a basis for the exception. The aspect of Evid.R. 803(4) which provides a hearsay exception for statements for diagnosis is inconsistent with the rigid "selfish interest" analysis of *Boston*. Although we recognize that "professional reliance," standing alone, may not be as significant an indicator of reliability as "selfish interest," it must be afforded some weight. It further supports the admissibility of hearsay statements in situations involving young children. For those reasons, the motivation of the declarant is not the only factor supporting the reliability of the statements.

Keeping in mind that the child's motivation is not the sole focus of the Evid.R. 803(4) inquiry, we find evidence of the child's motivation in the record, as revealed in Dr. Saluke's testimony. The court of appeals, in its majority opinion reversing Dever's conviction, found insufficient evidence of Kristen's motivation to seek treatment. Dr. Saluke testified that, during the course of the examination, she followed the customary procedure of explaining to Kristen why she was asking the questions. The court of appeals, however, was unconvinced that Kristen understood the purpose of the questioning. In reaching that conclusion, the court was heavily influenced by Dr. Saluke's testimony that she could not recall Kristen's specific response to the explanation of the need for the questioning. But, as we have stated above, a court should

not presume, as the court of appeals did, that the statements are unreliable merely because there is no indisputable evidence of the child's motivation. Rather, in a case such as this, when an examination of the surrounding circumstances casts little doubt on the motivation of the child, it is permissible to assume that the factors underlying Evid.R. 803(4) are present.[7]

"While in cases involving adults a cognitive connection between speaking the truth to physicians and receiving proper medical care may seem obvious, further analysis of the circumstances surrounding the examination of a child is necessary to determine whether the child understood the need to be truthful to the physician." *People v. Meeboer, supra,* 439 Mich. at 322-323, 484 N.W.2d at 626. We agree with this reasoning, but stress that our holding in this case requiring this specific examination of the circumstances applies only to Evid.R. 803(4) and only to declarants of tender years.

We therefore hold that a trial court does not abuse its discretion when it admits a child declarant's statement made for the purpose of medical diagnosis or treatment

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[7] In a dissenting opinion filed in the court of appeals, the judge stated that the hearsay statements were properly admissible under Evid.R. 803(4): " * * * [I]t is entirely reasonable to infer, as the trial court could have reasonably inferred under all the circumstances, that the child had the awareness and understanding necessary to grasp that the purpose of responding to the doctor's questions was to obtain diagnosis and treatment as a result of the molestation. We should not reverse the trial court's judgment without a more affirmative demonstration that an error of law, and not merely a finding of fact which happens to vary from the majority's view of the facts, was made below."

pursuant to Evid.R. 803(4), without first establishing the child declarant's unavailability to testify. Once the statements are admitted, their credibility is a matter to be evaluated by the factfinder.

In applying our holding to the facts of this case, we find that the trial court properly evaluated the circumstances accompanying the making of the child's statements. Since there is insufficient reason to doubt that the statements were made for purposes of medical diagnosis or treatment, the trial court did not abuse its discretion in finding that the statements were admissible pursuant to Evid.R. 803(4). Neither Evid.R. 803(4) nor 102 requires exclusion of the child's statements from the evidence, when as here the record supports the trial court's determination that the requirements of Evid.R. 803(4) were met.

B

We now proceed to specifically consider the propriety of admitting a child's statement identifying the perpetrator of her abuse under Evid.R. 803(4). Generally, statements of fault are seen as outside the scope of Evid.R. 803(4) because such statements are usually not relevant to either diagnosis or treatment. See, *e.g.*, *United States v. Iron Shell* (C.A. 8, 1980), 633 F.2d 77, 84. However, in *United States v. Renville, supra*, 779 F.2d at 436-438, the leading case in this area, a federal appellate court found that statements made by a child identifying the perpetrator of the sexual abuse *are* pertinent to both diagnosis and treatment of the child. The *Renville* court made a distinction between statements of fault generally (not admissible

pursuant to the medical diagnosis or treatment hearsay exception) and specific statements of *identity* by children in sexual abuse cases (which the court found to be admissible). The *Renville* court found several reasons why the statement of identity is pertinent to treatment or diagnosis. The statement assists the doctor in treating any actual injuries the child may have, in preventing future abuse of the child, and in assessing the emotional and psychological impact of the abuse on the child.[8] *Id.*

Boston, in considering the admissibility of a child's statement identifying the perpetrator, stated that "*Renville*'s conclusion, however, rests on the underlying assumption that the victim's motivation in identifying the abuser is to aid in her treatment or diagnosis." *Boston*, 46 Ohio St.3d at 123, 545 N.E.2d at 1235. Thus, the *Boston* court was not required to resolve the question, even though it did raise it. In so doing, *Boston* did not reject *Renville*'s analysis *per se*, but found it inappropriate in the circumstances of that case.

In view of our modification of *Boston*, we adopt *Renville*'s reasoning, and hold that statements made by a

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[8] We approve of *Renville*'s analysis regarding the child's identification of the perpetrator in sexual abuse prosecutions involving young children. There are several reasons for finding that the identification of the perpetrator is relevant to diagnosis and treatment. As Dr. Saluka testified at trial in this case, questioning of the allegedly abused child is important in determining the extent of contact, if any, the possibility of continued exposure to the perpetrator, and the possibility of sexually transmitted diseases. The identity of the perpetrator is particularly relevant to those inquiries, as well as to the psychological effects on the child.

child during a medical examination identifying the perpetrator of sexual abuse, if made for purpose of diagnosis and treatment, are admissible pursuant to Evid.R. 803(4), when such statements are made for the purposes enumerated in that rule. This means that a child's statement identifying his or her abuser should be treated the same as any other statement which is made for the purposes set forth in Evid.R. 803(4). We thus find that the trial court did not abuse its discretion in admitting Kristen's statement identifying Dever as her abuser.

C

In order to avoid any confusion we note that Evid.R. 807, effective July 1, 1991 and therefore not applicable here, requires an examination of the totality of the circumstances surrounding statements made by a child in a child abuse case in order to determine admissibility. The test contained in Evid.R. 807 has a purpose different from the test discussed here. Evid.R. 807's "totality of the circumstances" test is designed specifically with Confrontation Clause requirements in mind. See Staff Note to Evid.R. 807. On the other hand, the test under Evid.R. 803(4) goes solely to whether a statement *is* made for purposes of diagnosis or treatment, it is admissible pursuant to Evid.R. 808(4).

We also recognize that Evid.R. 807(A)(2) requires that a trial court make a finding that "[t]he child's testimony is not reasonably obtainable by the proponent of the statement" before the child's statements may be admissible pursuant to that exception. On the contrary, no finding of unavailability is necessary when a statement is

admitted pursuant to Evid.R. 803(4), because the rule itself provides that availability of the declarant is immaterial.

The Staff Note to Evid.R. 807 states: "The rule recognizes a hearsay exception for the statements of children in abuse situations. This exception is *in addition to* the exceptions enumerated in Evid.R. 803 and 804," (Emphasis added.) Thus, the trial court in its discretion determines which hearsay exception, if any, would most appropriately support the admission of the child's statements into evidence.

III

Having thus found that the trial judge properly admitted Kristen's statements, as related at trial by Dr. Saluke, pursuant to Evid.R. 803(4), we now consider the impact of the Confrontation Clause on this case.

In examining the Confrontation Clause issue, we must consider several decisions by the United States Supreme Court regarding the interplay between the hearsay rule and the Confrontation Clause.

Although the hearsay rule (along with its exceptions) and the Confrontation Clause protect similar values, the United States Supreme Court has repeatedly noted that the two are not coextensive. See *California v. Green* (1970), 899 U.S. 149, 155-156, 90 S.Ct. 1930, 1933-1934, 26 L.Ed.2d 489, 495; *Dutton v. Evans* (1970), 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213, 225-226. Thus, in some situations, even if evidence is admissible at trial as a hearsay exception, that evidence may nonetheless be inadmissible

because it violates a defendant's right of confrontation. The United States Supreme Court has provided a framework in which to analyze how the Confrontation Clause affects a particular hearsay exception.

A

In *Ohio v. Roberts* (1980), 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597, 607, the United States Supreme Court set forth a general approach for accommodating the sometimes competing interests of the Confrontation Clause and the hearsay exceptions. The court stated that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity." *Id.* In a holding which the court substantially narrowed in later cases, see *infra*, *Roberts* stated that the prosecution must make a good faith effort to produce the declarant, or demonstrate the declarant's unavailability. *Id.* The declarant's statement should then be admitted "only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." (Footnote omitted.) *Id.* at 66, 100 S.Ct. at 2539, 65 L.Ed.2d at 608.

In *United States v. Inadi* (1986), 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390, the Supreme Court considered whether the Confrontation Clause requires the prosecution to show that a co-conspirator is unavailable to testify

before the co-conspirator's statements may be admitted into evidence. The court held that the prosecution was not required to establish unavailability in that situation, and that this specific requirement of *Roberts* applies only where the prosecution seeks to admit testimony from a prior judicial proceeding instead of live testimony. *Inadi*, 475 U.S. at 392-394, 106 S.Ct. at 1124-1126, 89 L.Ed.2d at 396-398. The court stated that *Roberts* "cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." *Id.* at 394, 106 S.Ct. at 1125, 89 L.Ed.2d at 398. The court also noted that the true mission of the Confrontation Clause is to "'advance "the accuracy of the truth-determining process in criminal trials."'" *Id.* at 396, 106 S.Ct. at 1126, 89 L.Ed.2d at 399, quoting *Tennessee v. Street* (1985), 471 U.S. 409, 415, 105 S.Ct. 2078, 2082, 85 L.Ed.2d 425, 432.

The Supreme Court again considered the admissibility of statements made by a co-conspirator in *Bourjaily v. United States* (1987), 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144. The court observed that the hearsay exception for statements of a co-conspirator is firmly rooted. *Id.* at 188, 107 S.Ct. at 2782, 97 L.Ed.2d at 157. For that reason, the Supreme Court held that a co-conspirator's statements carry with them sufficient "indicia of reliability" and therefore a court need not conduct an independent inquiry into the reliability of the statements. *Id.*

B

While the foregoing cases set forth a general method of applying Confrontation Clause analysis when the

declarant does not testify at trial, two recent Supreme Court decisions considered the interaction of the Confrontation Clause with hearsay exceptions in circumstances involving sexual abuse of young children. In *Idaho v. Wright* (1990), 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638, the court considered whether a trial court properly admitted a hearsay statement made by a child pursuant to Idaho's "residual hearsay exception."[9] The court began its analysis by noting that "Idaho's residual hearsay exception, * * * under which the challenged statements were admitted, * * * is not a firmly rooted hearsay exception for Confrontation Clause purposes." *Id.* at ___, 110 S.Ct. at 3147, 111 L.Ed.2d at 653. For that reason, *Roberts* requires that the hearsay testimony be inadmissible unless "particularized guarantees of trustworthiness" are present. The court did not believe that the child's statement was particularly trustworthy,[10] and therefore found that the state had failed to carry its burden of demonstrating "particularized guarantees of trustworthiness" in the totality of the circumstances.[11]

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[9] The issue of unavailability of the declarant was not before the Supreme Court. The court assumed that the declarant was an unavailable witness, primarily because the trial court had found that the child was incapable of communicating with the jury, and defense counsel at trial did not disagree with that finding. *Id.*, 497 U.S. at ___, 110 S.Ct. at 3147, 111 L.Ed.2d at 652.

[10] The court noted that the questioning of the child was conducted in a suggestive manner, raising concerns about the reliability of the statement. *Wright supra*, at ___, 110 S.Ct. at 3152-3158, 111 L.Ed.2d at 659-660.

[11] The court specifically held that corroboration of the statement by other evidence was not a part of the trustworthiness inquiry. *Id.* at ___, 110 S.Ct. at 3148-3149, 111 L.Ed.2d at 655.

The *Wright* court made clear that its analysis would have been completely different if the hearsay exception had been "firmly rooted": "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Id.* at ___, 110 S.Ct. at 3147, 111 L.Ed.2d at 653.

In *White v. Illinois, supra,* 502 U.S. ___, 112 S.Ct. 736, 116 L.Ed.2d 848, the Supreme Court again considered the use of hearsay statements made by a child against a defendant being prosecuted for sexual assault of the child. The trial court allowed the hearsay statements into evidence as spontaneous declarations and also as statements made in the course of medical treatment. The appellate court affirmed that decision, finding that the accused's right of confrontation was not denied. Although the four-year-old girl did not testify at trial, no specific finding of unavailability was made by the trial court.

That holding means that one of the factors, announced in *State v. Boston* for analyzing trustworthiness of a child's hearsay statement, corroboration, is no longer valid. *Id.*, 46 Ohio St.3d at 127, 545 N.Ed.2d at 1238. Because this case does not require us to consider whether "particularized guarantees of trustworthiness" are present (we find that the child's statements were admissible as an Evid.R. 803[4] exception to the hearsay rule, a firmly rooted hearsay exception), we do not resolve that problem at this time.

The *White* court began its analysis by limiting the application of the unavailability requirement of *Roberts*, stating that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry *only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.*" (Emphasis added.) *White, supra*, 502 U.S. at ___, 112 S.Ct. at 741, 116 L.Ed.2d at 858. Thus, unavailability of the declarant need not be demonstrated when a hearsay statement is admitted pursuant to an Evid.R. 803 exception.

In agreeing that there was no denial of the defendant's right of confrontation, the Supreme Court held that "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *Id.* at ___, 112 S.Ct. at 743, 116 L.Ed.2d at 859. The court noted that such firmly rooted hearsay exceptions as spontaneous declarations and statements made in the course of receiving medical care are recognized as normally occurring in contexts that provide substantial guarantees of trustworthiness. *Id.* at ___, 112 S.Ct. at 742, 116 L.Ed.2d at 859. For that reason, the Confrontation Clause is automatically satisfied by a hearsay exception which is firmly rooted – the presence of "particularized guarantees of trustworthiness" need not be shown. *Id.* at ___, 112 S.Ct. at 742-743, 116 L.Ed.2d at 859-860.

Consistent with that approach, we determine that Evid.R. 803(4) is a firmly rooted hearsay exception in the circumstances of the case before us. See *White, supra*, at ___, 112 S.Ct. at 742, 116 L.Ed.2d at 859, fn. 8. To the

extent that *Boston* indicates a contrary result, we clarify that opinion.

C

In summary, *Wright* and *White* hold that, even in cases involving hearsay statements of children in the prosecution of the children's alleged abusers, if the hearsay statement at issue falls within a firmly rooted hearsay exception, as in the instant case, its admission does not violate the defendant's right of confrontation. *White, supra,* at ___, 112 S.Ct. at 743, 116 L.Ed.2d at 859; *Wright, supra,* 497 U.S. at ___, 110 S.Ct. at 3146, 111 L.Ed.2d at 652. In such a case, the prosecution is not required to demonstrate the unavailability of the declarant. *White, supra,* at ___, 112 S.Ct. at 741, 116 L.Ed.2d at 858.

On the other hand, if the hearsay statement at issue does not fall within a firmly rooted hearsay exception, further inquiry is required. Hearsay not falling within a firmly rooted exception must be excluded unless "particularized guarantees of trustworthiness" can be shown. *Wright, supra,* 497 U.S. at ___, 110 S.Ct. at 3147, 111 L.Ed.2d at 653.

In the instant case, Kristen's hearsay statements were admitted under a firmly rooted hearsay exception. Therefore, Dever's right of confrontation was not denied.

Our interpretation of *White* and *Wright* comports with the interpretation of other courts. For example, in *Dana v. Dept of Corr,* (C.A. 8, 1992), 958 F.2d 237, the court found that a four-year-old child's hearsay statements to a

pediatrician fell within the medical diagnosis and treatment hearsay exception. The court, citing *White*, concluded that, because this exception is firmly rooted, the reliability of the statements could be inferred and the admission of the statements into evidence did not violate the Confrontation Clause. *Id.* at 239. *See, also, United States v. George* (C.A. 9, 1992), 960 F.2d 97, 99 ("When hearsay testimony is properly admitted pursuant to [the medical treatment] exception, no further guarantees of trustworthiness are required."); *United States v. Balfany* (C. A. 8, 1992), 965 F.2d 575 (Confrontation Clause does not preclude admission of child's out-of-court statements under firmly rooted hearsay exception for medical treatment).

We hold that Evid.R. 102 does not prevent us from finding that the Evid.R. 803(4) hearsay exception is firmly rooted in the circumstances of this case. The admission into evidence of a hearsay statement pursuant to a firmly rooted hearsay exception does not violate a defendant's right of confrontation.

Conclusion

In conclusion, we find that the hearsay statements made by Kristen to Dr. Saluke were properly admitted into evidence pursuant to Evid.R. 803(4). Additionally, we find that Kristen's statement to Dr. Saluke identifying Dever as the perpetrator of the abuse was properly admitted into evidence pursuant to Evid.R. 803(4). We further find that Dever's right of confrontation was not violated by the admission of these statements. For all the

foregoing reasons, we reverse the judgment of the court of appeals and reinstate Dever's conviction.

Judgment reversed.

MOYER, C.J. HOLMES, DOUGLAS and H. BROWN, JJ., concur.

SWEENEY and WRIGHT JJ., dissent.

WRIGHT, J. dissenting. I simply cannot join in the majority's decision to ignore this court's prior decisions and to rewrite Evid.R. 803(4). The hearsay exception for statements pertinent to medical treatment or diagnosis " * * * is based upon the belief that the declarant's subjective motive generally guarantees the statement's trustworthiness. Since the effectiveness of the treatment depends upon the accuracy of information given to the physician, the declarant is motivated to tell the truth." *State v. Eastham* (1988), 39 Ohio St.3d 307, 312, 530 N.Ed.2d 409, 413 (H. Brown, J., concurring). If a child is not capable of comprehending the doctor's role and the danger of mistreatment, his or her statements cannot by presumed to be reliable, at least under this particular hearsay, exception.[12] See *United States v. Renville* (C.A. 8, 1985), 779 F.2d 430, 439; *United States v. Iron Shell* (C.A. 8, 1980), 633 F.2d 77, 83-84; *Cassidy v. Maryland* (1988), 74

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[12] The majority conveniently characterizes the motivational requirement of Evid.R. 803(4) as a strict requirement that the child be motivated to go to the doctor for treatment. This cramped interpretation strengthens the majority's argument that this requirement is unnecessarily stringent. While the strict foundation discussed by the majority is unnecessary, I do not believe that it is unreasonable to require that a child understand the doctor's role and why it is important to tell the doctor the truth.

Md.App. 1, 29-30, 536 A.2d 666, 680. Until today, this court has, and rightfully so, refused to follow other jurisdictions that have dispensed with the requirement that a child understand that his or her statements are for the purpose of medical treatment or diagnosis. See *State v. Boston* (1989), 46 Ohio St.3d 108, 122, 545 N.E.2d 1220, 1234.

I fully sympathize with the pain and anguish suffered by abused children and their families, and understand the difficulties inherent to the prosecution of a terrible crime that may leave no physical evidence and whose victims are unable to competently speak for themselves. The temptation is great to liberally construe the hearsay exceptions to allow more effective prosecution of these crimes. We must remember, however, that our ruling on the scope of this hearsay exception will apply with equal force to cases in which the evidence is overwhelming and to cases in which a doctor's statements are the only evidence that supports a conviction. If one imagines an innocent man or woman accused of this heinous crime, today's ruling evokes grave concern.

The majority's decision not only allows the child to speak through the mouths of others in a situation where the child cannot be questioned, but also gives the child's words the extra authority of being spoken by a doctor. Moreover, the testimony does not possess the traditional guarantees of reliability that form the basis for this particular hearsay exception. Evid.R. 102 mandates that this court construe the Ohio Rules of Evidence in accordance with common-law basis for those rules. It is not the province of this court to eviscerate those rules in order to

make it easier for the state to prosecute certain categories of crime.

Most importantly, this decision seriously undermines Evid.R. 807, which went into effect July 1, 1991. Evid.R. 807 was promulgated in recognition of the unique evidentiary problems raised in a child sexual-abuse case and sets forth a separate hearsay exception for the testimony of a sexually abused child. As the majority properly recognizes, Evid.R. 807 provides a hearsay exception that is in addition to the exceptions provided in Evid.R. 803 and 804. See Staff Note to Evid.R. 807. The Majority's liberal interpretation of Evid.R. 803(4) will actually allow prosecutors to evade the carefully considered controls of Evid.R. 807. Under today's decision, it appears that the child's testimony to a doctor will be admissible under Evid.R. 803(4), unless the defense can show the child was unduly influenced or some other special reason why the testimony is unreliable. Under Evid.R. 807, the doctor's testimony is not admissible unless the trial court carefully determines that the child is not able to testify, examines the totality of circumstances surrounding the statement when it was made to determine whether the statement is reliable and finds that there is independent proof of the sexual act. I believe that Evid.R. 807 strikes the appropriate balance between the needs of the child, the rights of the defendant and the state's interest in prosecuting this crime, and I am saddened to see the rule stripped of its effectiveness so prematurely.

I agree with the court of appeals that this case should be remanded to the trial court. An advanced four-year-

old might have the required level of understanding, but because the trial judge ruled that this child's awareness of the need for medical treatment was irrelevant to the admissibility of her statements, the trial record was not developed on this factual question. Accordingly, I would affirm the well-reasoned judgment of the court of appeals.

SWEENEY, J., concurs in the foregoing dissenting opinion.

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO	:	APPEAL NO. C-880712
Plaintiff-Appellee,	:	TRIAL NO. B-875350
vs.		
FREDERICK DEVER, JR.,	:	DECISION
Defendant-Appellant.	:	(Filed June 5, 1991)

Criminal Appeal on Reconsideration From: Supreme Court of the United States

Judgment Appealed From is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: June 5, 1991

Arthur M. Ney, Jr., Prosecuting Attorney, and Christian J. Schaefer, Esq., 411 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Andrew B. Dennison, Esq., 200 Main Street, Batavia, Ohio 45103, for Defendant-Appellant.

PER CURIAM.

This cause came on to be reconsidered upon the order of the Supreme Court of the Untied States vacating the previous judgment of this court and remanding the cause to this court for further consideration in light of

Idaho v. Wright (1990), 497 U.S. ___, 110 S. Ct. 3139, and upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, and the briefs and oral arguments of counsel.

Defendant Frederick Dever, Jr., appealed to this court from his conviction of one count of engaging in sexual conduct with a person of less than thirteen years of age, in violation of R.C. 2907.02.[1] Dever argues that the trial court denied his right of confrontation under the Sixth Amendment to the United States Constitution when it admitted, over his objection, the hearsay statements of a child declarant made to a physician. Dever asserts that the circumstances surrounding the statements indicate that they lacked a particularized guarantee of trustworthiness under the factors outlined in *Idaho v. Wright, supra,* and that the statements are not admissible under a firmly rooted hearsay exception such as Evid. R. 803(4) because the state failed to discharge its burden of establishing that the declarant's motive to make the statements was to obtain medical treatment. Having reconsidered this cause in light of *Idaho v. Wright, supra,* we agree with Dever's contentions, reverse the judgment of the trial court, and remand the cause for a new trial.

On October 21, 1987, at approximately 10:00 p.m., Dianne Potter, who lived on the second floor of a two-family building in Mariemont, Ohio, overheard Dever's

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[1] Dever was also found guilty of a second count of sexual contact with a person less than thirteen years of age, in violation of R.C. 2907.05, but was sentenced only on count one pursuant to R.C. 2941.25, relating to allied offenses of similar import.

conversation with his four-and-one-half-year-old daughter in the bathroom of his first-floor residence. Potter testified at trial that through the building's ductwork she heard Dever groaning and that he told his daughter to count to six hundred. The child began counting, and, as Potter further testified,

> * * * then he said oh, that feels so good and she said oh, does that feel good, Daddy, and he said yes, and he told her to keep counting and she stopped and he said come on, just count to 20, just count to 20, and she said no, I don't want to. I could hear mumbling and then I heard her say, oh, daddy, you got it all over my hand and he said yes, I got it all over you, didn't I, and then I just left the house, and went next door and called the police.

T.p. 171-72.

The day after Potter informed the police of the apparent incident of child sexual abuse, Mariemont Police Specialist Mike Wilson met Dever's wife, informed her of the allegations, and arranged for the child's removal from the residence the following day. At approximately 1:00 p.m., October 23, the child was taken to the Hamilton County Department of Human Services, where she was interviewed for approximately thirty to forty minutes by Wilson and a member of the sexual abuse intervention team, Beth Casbeer. Following the initial interview, the child was transported to Children's Hospital Medical Center, where she was interviewed a second time by Dr. Ann Saluke, in the course of a physical examination in the late afternoon.

Dr. Saluke's physical exam neither confirmed nor disproved a history of sexual abuse. The interview was initially conducted in the presence of Officer Wilson, the director of the Children's Hospital social services, and the child's mother. According to Officer Wilson's testimony,

> The social worker and I went into the room and Kristen and her mother were there and we had started to ask her questions about why she was there and she seemed to kind of jump from topic to topic and didn't really seem to be answering our questions and she kept looking to her mother and looking around the room and changing the subject and her mother said that Kristen seemed –
>
> [Defense Attorney]: Objection.
>
> THE COURT: Sustained.

T.p. 202. The child's mother eventually left at her own suggestion, however, after stating that the child was having difficulty talking about the matter in front of her.

At trial, Dr. Saluke testified that she followed the protocol used by members of the child abuse team at Children's Hospital, which included the gathering of an intake history by a team social worker and the questioning and examination of the child by the physician with the social worker. The doctor stated that the purpose of the questions was to determine the possible extent of a physical injury, the extent of contact and the possibility of sexually transmitted diseases, and that in some cases, assessment of the emotional or psychological impact upon the child would also be a reason for questioning. The doctor further stated that knowing the identity of the offender was important for the diagnosis and treatment

of the child's injury, to prevent possible repeated exposure to the abuse and to assess the emotional and psychological impact upon the child.

Dr. Saluke testified that she explained the purpose of the examination and treatment to the child, including the need to determine the offender's identity, prior to conducting the examination. The doctor stated that with a child the age of the defendant's daughter, the explanation would be given in terms of "bugs" or "germs" to tailor the wording to the child's understanding. However, when asked whether the child understood why she was being asked the questions, the doctor responded, "I don't recall her specific response." T.p. 201.

Before the child's hearsay statements were admitted, Dever's counsel renewed his objections on grounds raised before trial in a motion *in limine*.

Despite defense counsel's objections, Dr. Saluke was permitted by the trial court to testify that the child related the following statements during her examination:

> [The child] told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as the pee pee.
>
> Q. Did she identify what she meant by father's pee pee?
>
> A. The same area.
>
> Q. Okay, now did she describe that taste any further besides yucky taste?

A. She described it as mashed potatoes with butter.

T.p. 210.

The jury found Dever guilty, and after being sentenced by the trial court, Dever appealed to this court in appeal number C-880712. In an opinion dated January 31, 1990, this court relied on a recent plurality decision of the Supreme Court of Ohio, *State v. Boston* (1989), 46 Ohio St. 3d 108, 545 N.E.2d 1220, that involved circumstances similar to the case before us. As in *Boston*, this court recharacterized the trial court's finding that the child witness was incompetent as one that the child was merely unavailable, as contemplated by Evid. R. 804(A). This court further relied upon the guideline promulgated in Justice Douglas's plurality opinion, that:

> [W]e, pursuant to our inherent powers, hold that an out-of-court statement of an allegedly abused child of tender years, including identification of a perpetrator, made to a qualified expert in child abuse, *is admissible if the expert has independent evidence of physical or emotional abuse of the child,* the child has no apparent motive for fabricating the statement and the child has been found unavailable after a good-faith effort to produce the child in court.

Id., at 127, 545 N.E.2d at 1239. (Emphasis supplied.) Although this court acknowledged that the expert in this case, Dr. Saluke, lacked evidence of physical or emotional abuse, we place "great significance upon what Ms. Potter heard." *State v. Dever* (Jan. 31, 1990), Hamilton App. No. C-880712, unreported, at 9. Following our affirmance of the trial court's judgment, the Supreme Court of Ohio

dismissed Dever's motion for leave to appeal and appeal as of right on June 15, 1990, and his petition for rehearing, following the decision of *Idaho v. Wright*, on July 25, 1990. The case is again before us following the order of the Supreme Court of the United States vacating the previous judgment of this court and remanding the cause for further consideration in light of *Idaho v. Wright, supra*.

Before proceeding further, we note that there are two somewhat interrelated issues before us that stem from consideration of *Idaho v. Wright*, the first being largely a matter of constitutional law, and the second involving the application of the rules of evidence. First, may we still apply the guideline promulgated in *Boston* which permits the use of a child declarant's hearsay statements to a child abuse expert, in light of the prohibition in *Idaho v. Wright* against using corroborating evidence as a factor showing a particularized guarantee of trustworthiness in satisfaction of the test of *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S. Ct. 2531? Second, if the evidentiary guideline promulgated in *Boston* may not be used to admit such a hearsay statement, is the statement admissible under some other hearsay exception under Ohio law, such as Evid. R. 804(3), permitting the use of statements motivated by the desire to obtain medical treatment or diagnosis?

In deciding the first issue, we note that *Idaho v. Wright* involved a residual hearsay exception under Idaho law, Idaho Evid. R. 803(24), that permitted the use of a hearsay statement not falling within any of the traditional hearsay exceptions but having equivalent circumstantial guarantees of trustworthiness, where the court determined that the statement (a) was offered as evidence of a

material fact, (b) was more probative than any other reasonably available evidence and (c) would serve the purposes of the rules and the interests of justice if admitted. No such exception exists under Ohio law.

Under the test of compliance with the Confrontation Clause of the Sixth Amendment set forth in *Ohio v. Roberts, supra,* the hearsay statement of an unavailable[2] declarant is admissible only if it bears adequate "indicia of reliability." *Idaho v. Wright, supra,* at ___, 110 S. Ct. at 3146.

The Supreme Court of the United States held in *Idaho v. Wright* that Idaho Evid. R. 803(24) was not a firmly rooted hearsay exception under the first prong of the *Roberts* test. Under the second prong of the test, a statement may be deemed to bear adequate indicia of reliability if there is a showing of a "particularized guarantee of trustworthiness." *Id.*

Among the non-exclusive list of factors properly considered in determining whether a child witness's hearsay statements have a particularized guarantee of trustworthiness are the spontaneity of the statement and whether it was consistently repeated, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate. *Id.* at 3150. Not among those factors properly considered,

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[2] We assume, for purposes of argument only, that as in *State v. Boston, supra,* the trial court's determination that the child was incompetent can properly be recharacterized as one that the child was merely "unavailable," in light of our discussion and the disposition of this appeal on the ground that no hearsay exception is otherwise applicable.

however, is the existence of corroborating evidence to support a statement's reliability because such evidence "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility." *Id.*

Although Justice Douglas's opinion in *State v. Boston* was intended to conform with the Confrontation Clause, it is now clear that the first element of the "rule" promulgated in that opinion, allowing the use of a sexually abused child's hearsay statements identifying the perpetrator if the expert to whom the statements are given has independent evidence of physical or emotional abuse of the child, is invalid. See *Boston, supra,* at 127, 545 N.E.2d at 1239.

We do not think it proper for this court to attempt to redraft this "rule" of the Supreme Court of Ohio to conform to the contours of the Confrontation Clause in light of *Idaho v. Wright,* particularly where the majority of state justices did not concur in such a "rule" in the first instance.[3] We therefore hold that if the hearsay statement given to Dr. Saluke is to qualify as admissible evidence in

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[3] Justices Sweeney and Herbert J. Brown concurred in Justice Douglas's opinion in *Boston*. Chief Justice Meyer concurred in the syllabus and judgment. Justice Wright concurred in part and dissented in part. Justice Holmes concurred in the judgment, and Justice John T. Patton, of the Eighth Appellate District and sitting by designation, dissented. The "rule" promulgated in *Boston* was not contained within the syllabus and was not dispositive of the case.

this case, it must do so under one of the Ohio Rules of Evidence.

We proceed to address the second issue presented to us, whether the statements were admissible under any other Ohio hearsay exception, and in particular, Evid. R. 804(3), relating to statements made for purposes of obtaining medical treatment or diagnosis. Evid. R. 803(4) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available[4] as a witness:
>
> * * *
>
> (4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The trial court relied on *United States v. Renville* (C.A. 8, 1985), 779 F.2d 430, as authority for the proposition that the hearsay statements of a child declarant identifying a perpetrator are admissible where the perpetrator's identity was relevant to medical diagnosis or treatment including the treatment of emotional and psychological injuries and prevention of recurrent abuse and injury, *Id.* at 437-438. Although the *Renville* decision emphasized the admissibility of statements relating to identity, the decision did not dispense with the requirement that the

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[4] See our discussion concerning availability of the witness at fn. 2, *supra*.

declarant must be motivated by a desire to obtain treatment or diagnosis. *Id.* at 438-39.

The Supreme Court of Ohio apparently has not dispensed with the requirement under Evid. R. 803(4) that "the child's statement must have been motivated by her desire for medical diagnosis or treatment." *Boston, supra,* at 121, 545 N.E.2d at 1234. Although the general discussion in Justice Douglas's opinion notes that elsewhere courts have dispensed with analysis of a child's motive to make a statement, *Id.* at 122, 545 N.E.2d at 1234, citing *United States v. Nick* (C.A. 9, 1979), 604 F.2d 1199, we cannot dispense with this requirement without a clearer, authoritative statement that the rule in Ohio has been changed. We therefore hold that the child declarant in this case must have understood the need to obtain the perpetrator's identity for purposes of medical treatment and diagnosis, before her hearsay statements could be properly admitted into evidence.

The record discloses no such comprehension on the part of the child. Although the record reflects that Dr. Saluke explained the purposes of her questions to the child and the need to verify the perpetrator's identity, the doctor was unable to recall whether the four-and-one-half-year-old child indeed understood what had been explained to her. We therefore hold that the record contains an insufficient basis upon which the trial court could admit the hearsay evidence. Further, on the state of this record, we conclude that there is a reasonable probability that the erroneous admission of the hearsay evidence contributed to the defendant's conviction. See *State v. Thompson* (1981), 66 Ohio St. 2d 496, 422 N.E.2d 855; *State v. Sorrels* (Feb. 20, 1991), Hamilton App. No.

C-900115, unreported. The assignment of error is therefore sustained.

The judgment of the trial court is, accordingly, reversed and the cause is remanded to the trial court for a new trial and further proceedings in accordance with the law.

DOAN, P.J., and UTZ, J., CONCUR.
HILDEBRANDT, J., DISSENTS.

HILDEBRANDT, J., DISSENTING.

I respectfully dissent in part from the majority decision. Although I agree that the hearsay exception advanced in *State v. Boston* is no longer viable in the wake of the decision of the Supreme Court of the United States in *Idaho v. Wright*, and that the rule should not be redrafted by this court to conform with the Confrontation Clause, I find that the hearsay statements were nevertheless admissible under Evid. R. 803(4).

The majority has emphasized that Dr. Saluke, when testifying at trial, could not "recall [a] specific response" from the child declarant as to whether the child understood why she was being questioned about the molestation and the perpetrator's identity. I am not convinced, however, that the only reasonable conclusion to be drawn from this is that the child did not, in fact, appreciate the significance of the inquiry.

Affording due deference to factual findings of the trial court, in keeping with the presumption of regularity of proceedings below, I am instead persuaded that it is entirely reasonable to infer, as the trial court could have reasonably inferred under all the circumstances, that the

child had the awareness and understanding necessary to grasp that the purpose of responding to the doctor's questions was to obtain diagnosis and treatment as a result of the molestation. We should not reverse the trial court's judgment without a more affirmative demonstration that an error of law, and not merely a finding of fact which happens to vary from the majority's view of the facts, was made below.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 90-663

Frederick M. Deer, Jr.,

Petitioner,

v.

Ohio

ON WRIT OF CERTIORARI to the Court of Appeals of Ohio, Hamilton County.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Court of Appeals of Ohio, Hamilton County, for further consideration in light of *Idaho v. Wright,* 497 U.S. ___ (1990).

IT IS FURTHER ORDERED that the petitioner, Frederick M. Dever, Jr., recover from Ohio Three Hundred Dollars ($300.00) for his costs herein expended.

December 10, 1990

Clerk's costs: $300.00

APPENDIX E

THE SUPREME COURT OF OHIO

1990 TERM

To wit: June 13, 1990

State of Ohio, Appellee,	:	
v.	:	Case No. 90-502
Frederick Dever, Jr., Appellant.	:	ENTRY

(Filed June 15, 1990)

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by G. David Yaros.

(Court of Appeals No. C880712)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX F

THE SUPREME COURT OF OHIO

1990 TERM

To wit: July 25, 1990

State of Ohio, Appellee,	:	Case No. 90-502
v.	:	REHEARING ENTRY
Frederick Dever, Jr., Appellant.	:	(Hamilton County)

(Filed July 25, 1990)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. C880712)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX G

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO.
Plaintiff-Appellee,	:	C-880712
	:	TRIAL NO.
vs.	:	B-875350
FREDERICK DEVER, JR.,	:	OPINION.
Defendant-Appellant.	:	

PRESENTED TO THE CLERK
OF COURTS FOR FILING
(Filed January 31, 1990)
COURT OF APPEALS

Criminal Appeal from: Court of Common Pleas

Judgment Appealed from is: Affirmed

Date of Judgment Entry on Appeal: January 31, 1990

Arthur M. Ney, Prosecuting Attorney, Leonard Kirschner, Esq., Christian J. Schaefer, Esq., and James E. Butler, Esq., 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Yaros & Yaros and G. David Yaros, Esq., 615 East Seventh Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

HILDEBRANDT, J.

Defendant-appellant Frederick Dever, Jr., appeals from the judgment of the Hamilton County Court of Common Pleas in which he was found by intervention of

a jury to be guilty of rape.[1] For the reasons that follow, we affirm the trial court's judgment.

On February 21, 1987, the appellant resided with his wife and adopted daughter, Kristen, on the first floor of a two-family residence located in the village of Mariemont, Ohio. Diane Potter resided on the second floor of the building. At approximately 10:00 p.m., Potter was in her bathroom preparing to shower when she heard the appellant and Kristen talking.[2] At trial, Potter testified as follows:

> I heard Kristen crying and I heard [appellant] saying come on, come on, it will only take a minute and Kristen kept saying no, Daddy, I'm sleeping and he kept saying come on, come on, Kristen, come on, it is only going to take a minute. She said no, Daddy, I'm sleeping and then finally she said o.k. and I guess – I could hear them talking and it was just mumbling and it seemed like it was getting closer but I wasn't really paying attention at that time because I figured, I didn't really know what he was getting her up for but I figured it was something she had to do.
>
> * * *
>
> And I heard – anyway, I heard the voices getting louder and then I heard the toilet seat so I knew

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[1] The appellant had been charged with rape, R.C. 2907.02, and gross sexual imposition, R.C. 2907.05. The jury returned guilty verdicts as to each count. The trial court, finding that the charges were of similar import, imposed a sentence on the rape count only.

[2] Appellant's wife was as work at the time of the events *sub judice*.

> they were in the bathroom because that's where the toilet is.
>
> . . . Then I heard them talking, I heard [appellant] groaning, he groaned three times very loudly and that was what made me really start listening, I didn't turn on the water, I just listened and I heard him tell Kristen to count to 600 and I heard her counting and then he said oh, that feels so good and she said oh, does that feel good, Daddy, and he said yes, and he told her to keep counting and she stopped and he said come on, just count to 20, just count to 20, and she said no, I don't want to. I could hear mumbling and then I heard her say, oh, daddy, you got it all over my hand and he said yes, I got it all over you, didn't I, and then I just left the house, and went next door and called the police.

T.p. 171-72.[3]

Potter reported the foregoing conversation to Specialist Mike Wilson of the Mariemont Police Department. Wilson concluded that Potter's accusations warranted an investigation. The following day, Wilson informed the appellant's wife of Potter's allegations, and arranged for the removal of the child from the appellant's control. The next day, February 23, Wilson arranged for the intervention of the sexual abuse team of the Hamilton County Department of Human Services ("HCDHS"). Wilson informed the HCDHS team that the appellant was the alleged perpetrator. With the aid of HCDHS, Kristen was examined by Ann Saluke, M.D., at Children's Hospital.

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[3] Potter explained that she could hear and understand the foregoing exchange through a heating duct that was common to both bathrooms. See, also, State's Exhibit 1.

Although Dr. Saluke's physical examination neither confirmed nor disproved a history of sexual conduct, during the exam Kristen told the doctor that she had sexual contact with appellant.

Before the trial, the trial judge determined Kristen's competency to testify.[4] At the conclusion of the pretrial hearing, the court stated:

> All right, I have to conclude the rule says those children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined or relating them truly and there is no question that Kristen understands the truth and the difference between the truth and false statements and that she is a bright little girl. The problem is she just can't relate what happened in this instance two years ago, if it did occur, and for that reason I can't find her competent under [Evid. R.] 601 to testify as a witness under this test.
>
> * * *

T.p. 20. At trial, Dr. Saluke was permitted to testify, over the appellant's objection, concerning Kristen's statements to her, as follows:

> Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as the peepee.

T.p. 209-10.

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[4] Kristen was three and one-half years of age at the time of the alleged offenses and five and one-half years of age at the time of the proceedings below.

At the conclusion of the evidence, the jury returned the verdicts described above and the appellant was sentenced as it appears of record. Appellant now urges on appeal that the trial court erred by allowing Dr. Saluke to testify concerning what Kristen had told her about the crime *sub judice*. We are unpersuaded.

The Supreme Court of Ohio recently ruled on the use of a child's statement of identification made to an examining physician, under circumstances similar to the case before us, in *State v. Boston* (1989), 46 Ohio St. 3d 108, 545 N.E.2d 1220. In *Boston*, the abused girl awakened screaming during the night following a period of visitation with her estranged father. The child told her mother, " * * * Daddy put something up my bucket [vagina]." *Id.*, at 108, 545 N.E.2d at ___. The mother then observed redness in the vicinity of the child's genitals.

The following day the child was examined by a pediatrician, but the child refused to permit the doctor to touch her. The doctor's visual examination of the child's vaginal and anal areas yielded nothing to note

An internal physical examination of the child was not made until approximately one month later, during which time the father continued to visit her. Upon internal examination, the doctor made findings that were consistent with sexual conduct.[5] During the examination, the child told the doctor that the father was the perpetrator.

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[5] At trial, the pediatrician testified that the child suffered probable vaginal penetration and possible anal penetration.

(Continued on following page)

The child was also examined by a psychologist who observed the child " * * * play with [anatomically correct] dolls in a sexually precocious manner, [heard] the child use slang terms for genitalia, and noted signs of autonomic hyperactivity – typical of victims of child sex abuse." *Id.*, at 120, 545 N.E.2. at ___ (footnote omitted).

At Boston's trial, the mother and the two experts (the pediatrician and the psychologist) were permitted to testify about what the child told them concerning the identity of the perpetrator. The experts were further permitted to opine that the child's statements to them were truthful.

During the pretrial hearing to determine the three-year-old child's competency to testify, the child answered initial questions, sometimes by a nod of the head. She denied having been hurt and she made it clear that she did not want to talk to the judge. The court found the child incompetent to testify. During the trial, the court further explained its ruling:

> The child seems frightened, and considering the age of the child, considering and general fact of this particular case the Court based its incompetency or fact that the child was not allowed to be called on that and not on the ability of the child to understand its obligation to tell the truth and its ability to communicate.

Id., at 114, 545 N.E.2d at ___ (Emphasis omitted).

(Continued from previous page)

She further stated that "probable" meant 95-99 percent certainty while "possible" meant greater than fifty percent certainty.

In *Boston*, the Supreme Court of Ohio interpreted the trial court's ruling as having found the child to be unavailable as contemplated by Evid. R. 804(A) rather than incompetent to testify as prescribed by Evid. R. 601. The court explained:

> Thus, the trial judge really found (the victim) unavailable as a witness rather than incompetent to be a witness. We recognize that appellant contends (admittedly with some efficacy) that such a finding is not supported by the record. However, the determination of competency (and availability) is within the sole discretion of the trial court and absent a showing of an abuse of discretion, such a determination will not be disturbed by a reviewing court. We find no abuse of discretion here.

Id., at 115, 545 N.E.2d at ___ (Emphasis omitted).

In *Boston*, the Supreme Court of Ohio reversed the father's conviction of gross sexual imposition because the trial court denied him a fair trial by permitting the experts to testify that, in their opinion, the child told them the truth when she identified the father as the perpetrator. *Id.*, at 128-29, 545 N.E.2d at ___. The Supreme Court also determined that the use of expert testimony in child abuse cases is proper, *id.* at 120, 545 N.E.2d at ___, and set down guidelines for the use of such expert testimony. Among those guidelines, the court directed:

> (F) When a child declarant is unavailable and does not testify either at a hearing or trial and no exception to the hearsay rule is applicable and when "indicia of reliability" are absent, to satisfy the requirements of the Confrontation Clause the out-of-court statements must have a particularized "guarantee of trustworthiness." To show that there is a "guarantee of trust-

> worthiness," the proponent of a child's out-of-court statements must prove that a good-faith effort has been made to produce the child as a witness, there must be specific evidence of abuse, either physical or emotional, and there must be no apparent motive to falsify the out-of-court statements.

Id., at 127, 545 N.E.2d at ___ (Emphasis omitted). The court then held:

> * * * [A]n out-of-court statement of an allegedly abused child of tender years, including identification of a perpetrator, made to a qualified expert in child abuse, is admissible if the expert has independent evidence of physical or emotional abuse of the child, the child has no apparent motive for fabricating the statement and the child has been found unavailable after a good-faith effort to produce the child in court.

Id.

In the cause *sub judice*, as in *Boston*, the trial court precluded the victim from testifying because she could not remember the events constituting the alleged crimes. In both cases, the trial court concluded that the child could comprehend the differences between truthful and false statements and relate facts truly. See Evid. R. 601. Regardless of the trial judge's statements in this case concerning Kristen's competency to testify, we believe that Kristen, whom the state attempted to qualify as a witness, was *unavailable* under the Supreme Court's reasoning in *Boston*, and pursuant to Evid. R. 804. The rule states in pertinent part:

> (A) Definition of Unavailability.
>
> "Unavailability as a witness" includes situations in which the declarant:

* * *

(3) testifies to a lack of memory of the subject matter of this statement.

See *supra* at 6-7. We therefore hold that the element of unavailability, under the Supreme Court's *Boston* guidelines concerning the admissibility of a sexually abused child's out-of-court statement to an expert,[6] has been satisfied. See *supra* at 8.

Further, we find no evidence from which the trial court could have concluded that Kristen was fabricating the events set forth in her statement to Dr. Saluke. Rather, we find there was a guarantee of trustworthiness in the child's statement because the events concerning the crime related by Kristen would ordinarily have been far afield from the knowledge of a three-and-one-half-year-old child.

The fact that Dr. Saluke did not find evidence of physical or emotional abuse differentiates this case from *Boston*. However, we place great significance upon what Ms. Potter heard. Specialist Wilson, the investigating officer, made certain that he related, in great detail, the events leading up to Dr. Saluke's examination of Kristen to the HCDHS sexual abuse team. See. t.p. 54-55. Furthermore, Dr. Saluke acknowledged at trial that she was aware the appellant was the alleged perpetrator prior to Kristen's out-of-court statement to her. See. t.p. 215.

---

[6] The expertise of Dr. Saluke, who had administered to approximately two hundred fifty child-abuse victims, was not challenged below.

We, therefore, hold that, under the facts of this case, Kristen's out-of-court statement was admissible during the proceedings below. Accordingly, we overrule the appellant's solitary assignment of error and affirm the trial court's judgment.

KLUSMEIER, P.J., and UTZ, J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX H

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

State of Ohio	:	
Plaintiff	:	/s/ Gorman, J.
-vs-		No: B875350
Frederick Dever	:	
Defendant	:	

Entry

(Filed April 5, 1988)

Upon hearing in open court under E.R. 601, the Court hereby determines the [alleged /s/ RHG] victim Kristen Nicole Dever not competant to testify as of this date.

_____

Judge

/s/ James E. Butler, AP

/s/ Louis Rubenstein
Attorney for Def

APPENDIX I

Constitution of the United States

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

AMENDMENT XIV

[Pertinent Provision]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

Section 2907.02, Revised Code of Ohio (Rape.)

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when either of the following apply:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

* * *

Section 2907.05, Revised Code of Ohio (Gross sexual imposition.)

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

* * *

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A)(1) or (2) of this section is a felony of the fourth degree. Violation of division (A)(3) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

* * *

APPENDIX K

Rules of Evidence, Title 23, Revised Code of Ohio

RULE 102. PURPOSE AND CONSTRUCTION

The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. These rules shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended and shall not supersede substantive statutory provisions.

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly and;

* * *

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT MATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(A) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

* * *

(3) testifies to a lack of memory of the subject matter of his statement; or

* * *

Evid R 807

Hearsay exceptions; child statements in abuse cases

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is to reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) the child is absent from the trial or hearing;

(b) the proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) it is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

(b) the illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's testimony or attendance is not reasonably

obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

Adopted eff. 7-1-91

Supreme Court, U.S.
FILED
JAN 26 1993
OFFICE OF THE CLERK

NO. 92-1121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

FREDERICK M. DEVER, JR.,
PETITIONER,

vs.

THE STATE OF OHIO,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

(1) DOES THE CONFRONTATION CLAUSE PROHIBIT THE ADMISSION OF HEARSAY FALLING WITHIN THE FIRMLY ROOTED "MEDICAL DIAGNOSIS AND TREATMENT" EXCEPTION TO THE HEARSAY RULE IN A CRIMINAL CASE?

(2) DOES A STATE SUPREME COURT, IN REVIEWING A CONVICTION IN A CRIMINAL CASE FOLLOWING A REMAND BY THE UNITED STATES SUPREME COURT FOR RECONSIDERATION IN LIGHT OF RECENT CASES DECIDED BY THE UNITED STATES SUPREME COURT ERR, IN CONSIDERING THOSE CASES?

(3) DOES A DUE PROCESS VIOLATION OCCUR WHEN A STATE SUPREME COURT INTERPRETS STATE RULES OF EVIDENCE AND AFFIRMS THE INTERPRETATION GIVEN THEM AT THE TRIAL LEVEL?

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NO DUE PROCESS VIOLATION OCCURS WHEN THE INTERPRETATION OF STATE EVIDENCE RULES BY A TRIAL COURT ARE AFFIRMED BY THE STATE SUPREME COURT. 14

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NO. 92-1121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

FREDERICK M. DEVER, JR.,
PETITIONER,

vs.

THE STATE OF OHIO,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINIONS BELOW

The opinion of the Ohio Supreme Court reviewing the decision of the Court of Appeals, First Appellate District and reinstating the judgment of conviction of the Court of Common Pleas is reported at *State* v. *Dever*, 64 Ohio St.3d 401, 596 N.E.2d 436 (1992), and is set out as Appendix B of the petition.

The judgment of conviction of the Court of Common Pleas, Hamilton County, Ohio (1988) is unreported and is set out as Appendix A to this brief. The first Opinion of the First District Court of Appeals, Hamilton County, Ohio (1990), affirming that conviction is unreported and set out as Appendix G to the petition.

This court's decision in granting a writ of certiorari and remanding the case to the First District Court of Appeals,

Hamilton County, Ohio, is reported at *Dever* v. *Ohio*, 111 S.Ct. 575, 112 L.Ed.2d 581 (1990). (Appendix D to the petition)

The decision of the First District Court of Appeals, Hamilton County, Ohio (1991), following the remand is unreported and set out as Appendix C to the petition.

JURISDICTION

This Court has jurisdiction to review the constitutional claims made under 28 U.S.C. 1257. This court does not have authority to determine and interpret the Ohio Rules of Evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, Section 1, to the Constitution of the United States.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OHIO RULES OF EVIDENCE

Evidence Rule 102:

"**Purpose and construction**

The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. These rules shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended and shall not supersede substantive statutory provisions."

Evidence Rule 803:

"**Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

FEDERAL RULES OF EVIDENCE

Evidence Rule 102:

"**Purpose and construction.**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Evidence Rule 803:

"**Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

STATEMENT OF THE CASE

On October 21, 1987, Diane Potter lived on the second floor at 6947 Cambridge Drive in Mariemont, Hamilton County, Ohio. (T.p. 168, 235) The Dever family lived on the first floor. (T.p. 168, 169) The construction of the building was such that sounds from the first floor bathroom traveled to the second floor bathroom. (T.p. 169, 170)

Shortly after ten o'clock, Ms. Potter prepared to take a shower and could clearly hear voices from the first floor bathroom. (T.p. 169, 177) Ms. Potter heard Kristen Dever whining or crying and her step-father, defendant, saying "come on, come on, it will only take a minute." Kristen kept saying "no" and defendant kept saying "come on." Eventually, Kristen said "okay." (T.p. 171)

Following this, Ms. Potter heard defendant groaning loudly. (T.p. 172) Ms. Potter then described the exchange she heard as follows:

> "He groaned three times very loudly and that was what made me really start listening, I didn't turn on the water, I just listened and I heard him tell Kristen to count to 600 and I heard her counting and then he said oh, that feels so good and she said oh, does that feel good daddy, and he said yes and then he told her to keep counting and she stopped and he said come on, just count to 20, just count to 20 and she said no, I don't want to. I could hear mumbling and then I heard her say oh, daddy, you got it all over my hand and he said yes, I got it all over you, didn't I." (T.p. 172)

Upon hearing this, Ms. Potter called police. (T.p. 172)

Mariemont Police Officer Mike Wilson initially received the call at 11:00 p.m. and asked Ms. Potter to come to the police station to make a report. (T.p. 233, 234) Officer Wilson, after consulting an assistant prosecuting attorney,

located and consulted Kristen's mother, Charlene Dever. (T.p. 235, 236) Police Officer Wilson carefully laid out the circumstances leading to the statement. He was careful to have Charlene Dever remove the victim from her home without a confrontation. (T.p. 251) The second day following Ms. Potter's 11:08 p.m. report to police, Officer Wilson met with Kristen Dever and Charlene Dever. (T.p. 261) The three went to the County Welfare Department. He was careful not to characterize the type of sexual activity he suspected. Only the Diane Potter statement was supplied. (T.p. 258) During the time going to the Welfare Department and Children's Hospital, Kristen did not discuss the offense with the police officer. (T.p. 262, 263) The officer did not indicate to anyone that there was an eye witness to the offense. (T.p. 261) From there, Officer Wilson, Kristen and her mother went to Children's Hospital.

Dr. Ann Saluke, M.D., conducted the examination. (T.p. 192, 193, 194) Dr. Saluke testified that part of the examination procedure is an interview with the child. (T.p. 194) The purpose of the questioning is to get some indication of possible physical injuries, to determine the extent of contact, the possibility of sexually transmitted diseases, the risk of repeated exposure, and the risk of psychological damage. (T.p. 194 to 200) The doctor further testified that the identity of the offender is necessary for proper diagnosis and treatment for the reasons stated above. (T.p. 195, 200)

The interview with Kristen began about 4:30 p.m. with the doctor, social worker, and Kristen's mother present. (T.p. 201, 202) Kristen would not answer any questions on the subject of the abuse as long as her mother was present. (T.p. 202) Instead, Kristen would simply jump from subject to subject. (T.p. 202) Kristen's mother was teary-eyed, stated Kristen had trouble talking in front of her on the subject, and said it would be better if she left the room. (T.p. 203)

After Kristen's mother left, Kristen told Dr. Saluke that her father, the defendant, put his "pee pee" in her mouth and

there was white stuff with a "yucky taste." (T.p. 209, 210) Kristen described the taste further and indicated that "pee pee" indicated genitalia. During the episode, Kristen said defendant touched her "pee pee." (T.p. 210)

On November 25, 1987, the Grand Jury of Hamilton County, Ohio returned indictment B-875350 charging defendant with Rape and Gross Sexual Imposition. Defendant entered a not guilty plea and retained counsel on December 4, 1988.

The Court of Common Pleas, Hamilton County, Ohio, found the victim, defendant's four year old step-daughter, could not testify on April 5, 1988. On August 29, 1988, a jury was impaneled and trial began. On September 1, 1988, the jury returned its verdict finding defendant guilty as charged.

The Court of Common Pleas, Hamilton County, Ohio, imposed a sentence on October 12, 1988, of 10 to 25 years plus costs. Five years of the minimum was ordered to be actual incarceration.

On November 10, 1988, a notice of appeal was filed to the First District Court of Appeals, Hamilton County, Ohio. That court cited coroborating evidence to justify the admission of the out of court statement. The judgment was affirmed on January 31, 1990.

The Ohio Supreme Court declined to hear the case on June 13, 1990.

The United States Supreme Court on December 10, 1990, granted certiorari and vacated the judgment of the First District Court of Appeals, Hamilton County, Ohio, for further consideration in light of *Idaho* v. *Wright*, 497 U.S. ____, 110 S.Ct. 3139 (1990).

On the remand, the First District Court of Appeals, Hamilton County, Ohio, reversed the judgment of the Court of Common Pleas. An appeal was then taken by the State of Ohio to the Supreme Court of Ohio. That court reinstated the judgment of the Court of Common Pleas.

REASONS FOR DENYING THE WRIT

I

THE "CONFRONTATION CLAUSE" DOES NOT PROHIBIT THE ADMISSION OF HEARSAY WHICH FALLS WITHIN THE FIRMLY ROOTED "MEDICAL DIAGNOSIS AND TREATMENT" EXCEPTION TO THE HEARSAY RULE IN A CRIMINAL CASE.

ARGUMENT

The pertinent fact which gives rise to the single issue which has been litigated in this case is that a child's statement to a treating medical doctor was admitted pursuant to Ohio Evidence Rule 803(4). The trial court relied upon *United States* v. *Renville*, 779 F.2d 430 (C.A., 1985), in determining to admit the child's statement to the medical doctor.

The foundation for the admission of this evidence included the fact that the child was not coached. The report did not come from the highly charged atmosphere of a domestic dispute. The doctor made certain the child was not frightened during her examination. The physician explained to the child the necessity of determining what had happened to her in terms of finding bugs and helping the person who touched her. The child insisted upon talking to the medical doctor. The child refused to talk about the subject in the presence of her mother. The medical doctor testified that immediately after the mother left the room the child described what happened in detail which goes beyond the ordinary knowledge of a four year old. She stated:

> "A. Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as the pee pee.

> Q. Did she identify what she meant by father's pee pee?
>
> A. The same area.
>
> Q. Okay, now did she describe that taste any further beside yucky taste?
>
> A. She described it as mashed potatoes with butter." (T.p. 209, 210)

The Court of Common Pleas found that this fell within Ohio Evidence Rule 803(4). The Ohio Supreme Court affirmed and found no confrontation clause violation holding in syllabus (3):

> "3. The admission into evidence of a hearsay statement pursuant to a firmly rooted hearsay exception does not violate a defendant's right of confrontation. (**White v. Illinois** [1992], 502 U.S. ____, 112 S.Ct. 736, 116 L.Ed.2d 848, followed.)"

The issue before this court is whether the Ohio Supreme Court properly applied **White v. Illinois**, 502 U.S. ____, 112 S.Ct. 736, (1992), and **Idaho v. Wright**, supra.

Idaho v. *Wright*, supra, was followed because the Ohio Supreme Court *did not* rely upon any corroboration of this statement to determine admissibility. Instead, a well rooted exception to the hearsay rule was used to admit the testimony. This Court in *Idaho* v. *Wright*, supra, held:

> "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."

Thus, the Ohio Supreme Court followed the decision in *Idaho* v. *Wright*, supra.

The case of *White* v. *Illinois*, supra, is more directly on point.[1] At page 742 and 743 of the Supreme Court reporter this Court held:

> "We note first that the evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.
>
> Similarly, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.
>
> * * *
>
> We therefore see no basis in **Roberts** or **Inadi** for excluding from trial, under the aegis of the Confrontation Clause, evidence embraced within such exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment."

Thus, statements admitted under the hearsay exception for medical diagnosis and treatment do not violate the Confrontation Clause.

Petitioner claims, however, that the Ohio Supreme Court, in interpreting Ohio Evidence Rule 102, expanded the "medical diagnosis and treatment exception" to the hearsay rule beyond the "common law" exception. Ohio Evidence Rule 102 significantly differs from Federal Evidence Rule 102

---

[1] *White* v. *Illinois*, supra, involved a 4 year-old as does this case. General claims about the knowledge and motivations of the out of court declarants in *White* v. *Illinois* and the case at bar are necessarily the same.

in that Ohio courts may not broadly construe the evidentiary rules. The discussion of this issue by the Ohio Supreme Court involved a modification and expansion of the prior Ohio Supreme Court cases of *Cleveland Ry Co.* v. *Merk*, 124 Ohio St. 596, 180 N.E. 51 (1932)[2] and *State* v. *Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989).[3] The net result was for the Ohio Supreme Court to bring its interpretation of Ohio Evidence Rule 803(4) into line with the identically worded Federal Evidence Rule 803(4).

It is submitted that this change did not break the hearsay exception used in this case from its firmly rooted moorings.

---

[2] This 1932 case limited this Ohio hearsay exception to statements relevant to *treatment* only.

[3] *Boston* appeared to use corroboration in determining admissibility in violation of *Idaho* v. *Wright*, supra.

II

A STATE SUPREME COURT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY APPLYING CASES DETERMINED BY THE UNITED STATES SUPREME COURT FOLLOWING A REMAND BY THAT COURT.

Next, petitioner argues that a violation of due process occurred because the state was not required to prove a "motivational factor" or "prove an indicia of reliability and guarantee of trustworthiness." This Court remanded the original *Dever* case to the Ohio courts for consideration of *Idaho* v. *Wright*, supra. Subsequent to the remand, *White* v. *Illinois*, supra, was decided. Both of those cases hold that proffered hearsay falling within a firmly rooted exception to the hearsay rule has sufficient guarantees of reliability for the Confrontation Clause. Once the Ohio Supreme Court found that the hearsay met a firmly rooted exception (medical diagnosis or treatment) it was unnecessary to make the further inquiries required by *Idaho* v. *Wright*, supra. Those are required when non-firmly rooted exceptions, such as the residual exception discussed in *Idaho* v. *Wright*, supra, are used.

Petitioner goes on to repeat his claim that the broadening of Ohio's Evidence Rule 803(4) to make its interpretation identical to Federal Evidence Rule 803(4) loosened it from its "firmly rooted" moorings. This claim is again baseless as in its opinion the Supreme Court of Ohio at page 412 stated:

> "Keeping in mind that the child's motivation is not the sole focus of the Evid. R. 803(4) inquiry, we find evidence of the child's motivation in the record, as revealed in Dr. Saluke's testimony.
>
> * * *
>
> But, as we have stated above, a court should not presume, as the court of appeals did, that the statements are unreliable merely because there is no

> indisputable evidence of the child's motivation. Rather, in a case such as this, when an examination of the surrounding circumstances casts little doubt on the motivation of the child, it is permissible to assume that the factors underlying Evid. R. 803(4) are present."

Thus, the Ohio Supreme Court did not eliminate a motivational requirement. Instead, it found that the motivational element is provided in Dr. Saluke's testimony.

III

NO DUE PROCESS VIOLATION OCCURS WHEN THE INTERPRETATION OF STATE EVIDENCE RULES BY A TRIAL COURT ARE AFFIRMED BY THE STATE SUPREME COURT.

Finally, petitioner claims that the interpretation given Ohio Evidence Rule 803(4) was an improper "retrospective" interpretation. Prior to the 1988 trial in this case Ohio Evidence Rule 803(4) had been in place six years. It had not been subject to any interpretation by a syllabus paragraph, per curiam opinion or even a majority opinion of the Ohio Supreme Court. The trial court, finding Ohio Evidence Rule 803(4) identical to Federal Evidence Rule 803(4) cited and relied upon Federal cases interpreting that rule. Following the trial the Ohio Supreme Court decided *State* v. *Boston*, supra. Following *Boston* this case was decided. *Boston* was modified and the Ohio Supreme Court brought the Ohio interpretation of Ohio Evidence Rule 803(4) into line with the identically worded federal counterpart used by the trial court. Thus, no "retrospective" application of anything occurred.

Finally, the petitioner is actually claiming that the decision in *State* v. *Dever* by the Ohio Supreme Court was an ex post facto law. He couches his claim as "due process" rather than an ex post facto law because this court has eliminated changes in the rules of evidence from the definition of ex post facto laws.

The "change," if any occurred in the Ohio Supreme Court decision, dealt with a rule of evidence. It does not punish previously innocent conduct, increase punishment or deprive defendant of a defense which was previously available. *Collins* v. *Youngblood*, 497 U.S. ____, 110 S.Ct. 2715 (1990). That case reformulated the test for an "ex post facto law" set out in *Calder* v. *Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), which explicitly prohibited changes to the "legal rules of evidence" to the following:

> "The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the *Ex Post Facto* Clause of Art. 1, § 10."

Significantly, the language dealing with alteration of the rules of evidence was deleted. Footnote 3 in *Collins* v. *Youngblood*, supra, specifically provides:

> "3. The **Beazell** definition omits the reference by Justice Chase in **Calder v. Bull**, 3 Dall. 386, 1 L.Ed. 648 (1798) to alterations in the "legal rules of evidence." See also **Hope v. Utah**, 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884) (approving procedural changes 'leaving untouched the nature of the crime and the amount or degree of proof essential to conviction'). As cases subsequent to **Calder** make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes. **Thompson v. Missouri**, 171 U.S. 380, 386-387, 18 S.Ct. 922, 924-925, 43 L.Ed. 204 (1898) (rejecting **ex post facto** challenge to retroactive application of statute making admissible handwritten documents as handwriting exemplars); **Hopt, supra**, 110 U.S., at 588-590, 4 S.Ct. at 209-210 (upholding retroactive application of statute making felons competent to testify."

Obviously the deletion of the language concerning "new evidentiary rules" was an intentional deletion by the court. Thus, no ex post facto violation occurred.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully,

JOSEPH T. DETERS
PROSECUTING ATTORNEY

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APPENDIX A

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

CASE NO. B875350

THE STATE OF OHIO,

Plaintiff,

vs.

FREDERICK DEVER,

Defendant.

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel Louis Rubenstein on the 12th day of October 1988 for sentence.

The Court informed the defendant as the defendant well knew, after trial by Jury, the defendant had been found guilty of the offenses of Rape 2907.02 R.C., Count 1, and Gross Sexual Imposition 2907.05 R.C., Count 2.

The Court afforded defendant's Counsel an opportunity to speak on behalf of defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's own behalf or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned in Ohio State Penitentiary for a minimum term of Ten (10) years (Five (5) years Actual) to a maximum term of Twenty-five (25) years.

(Count 2 is an allied offense of similar import and no sentence is passed pursuant to R.C. 2941.25.)

Pay costs.

_____

JUDGE

Defendant was notified of the right to appeal as required by Crim. R. 32 (A)(2).